United States Court of Appeals for the Second Circuit



APPENDIX

5-7271 ORIGINAL

WITH PROOF OF SERVICE

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

POLORON PRODUCTS, INC. (with substitution applied for by Dynamark Corporation, assignee),

Plaintiff-Appellant,

JUI 10 1975

SECOND CIRC

LYBRAND ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff-Appellee

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FEIWELL,

Third-Party Defendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

GOLD, FARRELL & MARKS

Attorneys for Plaintiff-Appellant Poloron Products, Inc. and Third-Party Defendants Dynamark Corporation, Samuel Levitt, Carl Levitt, Jay Levitt and George Feiwell 595 Madison Avenue, New York, New York 10022

HUGHES HUBBARD & REED

Attorneys for Defendant and Third-Party Plaintiff-Appellee Lybrand Ross Bros. & Montgomery (now known as Coopers & Lybrand) One Wall Street, New York, New York 10005

BOTEIN, HAYS, SKLAR & HERZBERG Attorneys for Third-Party Defendant Poloron Products of Indiana, Inc. 200 Park Avenue, New York, New York 10017

(4833B)

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TABLE OF CONTENTS

	PAGE
Relevant Docket Entries	1 A
Amended Complaint, filed March 14, 1974	3 A
Exhibit 1 to Amended Complaint Exhibit 2 to Amended Complaint Exhibit 3 to Amended Complaint	42 A
Answer and Counterclaims, filed May 15, 1974	53 A
Exhibit A to Answer and Counterclaims . Exhibit B to Answer and Counterclaims . Exhibit C to Answer and Counterclaims . Exhibit D to Answer and Counterclaims .	69 A
Third Party Complaint, filed May 16, 1974 .	74 A
Exhibit A to Third Party Complaint Exhibit B to Third Party Complaint Exhibit C to Third Party Complaint Exhibit D to Third Party Complaint Exhibit E to Third Party Complaint	95 A 145 A 149 A
Affidavit of Martin R. Gold, sworn to September 20, 1974, in support of motion to dismiss counterclaims and third party complaint	153 A
Exhibit D to affidavit of Martin R. Gold	165 A
Affidavit of Powell Pierpoint, sworn to November 4, 1974, in support of motion by defendant to dismiss amended complaint and for summar, judgment	176 A
Exhibit G to affidavit of Powell	185 A

PAGE

Arfidavit of Harris J. Amhowitz, sworn to November 4, 1974, in support of motion by defendant to dismiss amended complaint and for summary judgment	189	А
Affidavit of Carl Levitt, sworn to December 9, 1974, in support of motion to dismiss counterclaims and third party complaint and in opposition to defendant's motion for summary judgment	197	A
Exhibit A to affidavit of Carl Levitt . Exhibit B to affidavit of Carl Levitt .	208	Д
Affidavit of Menahem Jacobi, sworn to December 10, 1974, in support of motion to dismiss counterclaims and third party complaint and in opposition to defendant's motion for summary judgment	218	A
Affidavit of Martin R. Gold, sworn to December 11, 1974, in support of motion to dismiss counterclaims and third party complaint and in opposition to defendant's motion for summary judgment	225	А
Memorandum and Order of Hon. William C. Conner, dated April 3, 1975	228	А
Notice of Appeal, filed May 2, 1975	241	А
Affidavit of William M. Barron, sworn to May 28, 1975, in support of motion to dismiss appeal	243	A
Exhibit C to affidavit of William M. Barron	247	А

	PAGE
Exhibit 3 to Affidavit of Martin R. Gold, sworn to June 4, 1975, in opposition to motion to dismiss appeal	250 A
Exhibit 5 to Affidavit of Martin R. Gold, sworn to June 4, 1975, in opposition to motion to dismiss appeal	251 A
Exhibit A to Affidavit of Martin R. Gold, sworn to June 5, 1975, in opposition to motion to dismiss appeal	252 A

RELEVANT DOCKET ENTRIES

72 Civ. 3884

DATE	PROCEEDINGS
3/14/74	Filed Amended Complaint.
5/15/74	Filed Answer and Counterclaim of Defendant.
5/16/74	Filed Third Party Complaint.
9/24/74	Filed Affidavits and Notice of Motion by pltf. and third party defts. for an order dismissing the two counterclaims set forth in the answer of deft. and dismissing these and claim for relief contained in defts. third party complaint as indicated roble on 10-14-74, before Conner, J.
11/6/74	Filed Affidavit & Notice of Motion by deft. and third party pltf. for an order dismissing the amended complaint upon the ground of res judicata and for failure to state a claim upon which relief can be granted etc. as indicated rtble before Conner J. on 11-15-74.
12/13/74	Filed pltf's affdvt. of Menahem Jacobi in support of motions to dismiss counterclaims and third-pty claims interposed by deft. Lybrand, Ross Bros. & Montgomery, and in opposition to Lybrand's motion to dismiss.
4/3/75	Filed Memorandum-Opinion #42169 and Order for the reasons stated, the complaint and the counterclaims are hereby dismissed and Lybrand's motion for an award of atty's fees is denied. So ordered - CONNER, J.
5/2/75	Filed pltf's notice of appeal from order entered 4-3-75, which dismissed the complaint. Copies to Hughes, Hubbard & Reed and Botein, Hays, Sklar & Herzberg, Entered 5-5-75.

RELEVANT DOCKET ENTRIES

DATE

PROCEEDINGS

Filed motion to dismiss appeal, appellee, p/s. 5/30/75 Filed affidavit in opposition to motion to 6/5/75 dismiss appeal, appellant, p/s. Filed motion for an order pursuant to rule 0/5/75 43(b) FRAP, for an order substituting Dynamark Corp. as plaintiff-appellant, appellant, p/s. Filed affidavit in opposition to motion to 1/6/75 dismiss appeal, p/s. 6/10/75 Filed order referring to panel that will hear the appeal the motion. Filed order referring to panel that will hear 10/75 the oppeal the motion to substitute Dynamark Corp. and amend caption.

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC., a New York corporation,

72 Civ. 3884

Plaintiff,

-against-

LYBRAND, ROSS BROS. & MONTGOMERY.

AMENDED COMPLAINT JURY DEMANDED

Defendant.

Plaintiff Poloron Products, Inc., by its attorneys, Gold, Farrell & Marks, for its amended complaint brein, alleges as follows:

THE PARTIES

- 1. Plaintiff Poloron Products, Inc., (hereinafter referred to as "Poloron New York") is a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York.
- 2. Defendant Lybrand, Ross Bros. & Montgomery
 (hereinafter referred to as "Lybrand") is a general partnership of certified public accountants, organized under the
 laws of the State of New York, doing business in many cities
 throughout the United States, including the City of New York,
 State of New York. Defendant Lybrand represents itself as a
 firm of expert accountants and auditors.

JURISDICTION

3. The claim set forth herein arises under the Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. \$78j(b), and Rule 10b-5 of the Securities and Exchange

Annual harets as Anhielt B is a belef departuates of all real properties which are lessed to the Company, including all plants and structures located thereon. A copy of each such lease has heretofore been delivered to Euger by Seller! Each such leasehold estate purported to be granted by each such lease is owned by the Company and each such lease is in good standing, valid and enforceable in accordance with its To the best of Sellers' knowledge and belief, terms. / all improvements in or on premises subject to such leases conform to all applicable state, county and local laws, including, without limitation, zoning, building and safety ordinances. There is not under any of such leases any existing default or event of default or event which, with notice or lapse of time or both, would constitute a default by the Company. The plants, and the machinery and equipment of the Company currently in operation, are in good working condition and in a state of good maintenance and repair.

Anaexed hereto as Exhibit E is

K. ThexSeller hypereretofore marked for

identification, and wdelivered to Duyer, a list of substantially
all the machinery, equipment, tools, dies, drawings and plans,
furniture, fixtures and automobiles owned by the Company. The

Company owns outright all the machinery, equipment, tools, dies,
drawings and plans, furniture, fixtures and automobiles described in said list, other than personal property leased by the

Company pursuant to leases listed in Exhibit D hereto, and owns
outright all other assets and properties reflected in the above

mentioned talance sheet of the Company as at September 30, 1967,
except for latitude the automot of which list list will leaved in
or acquired after said date, other than such assets or properties
sold or otherwise disposed of in the ordinary course of business
subsequent to said date and orior to the date hereof, in each

Labienal City Dank, Habsohman Division, and a lien in favor of Gardex in the amount reflected in the aforesaid balance sheet.

sheet as at August 31, 1967 and thereafter acquired, approximately, were obtained pursuant to sales in the ordinary course of business and, except as set forth in Exhibit X, Sellers have no reason to believe that such receivables will not be collectible in the ordinary course in amounts not less than the amounts thereof carried on the books of the Company.

August 31, 1957 belance sheet, or thereafter acquired, are of good and merchantable quality. The Sellers have no reason to believe that any product or equipment heretofore sold by the Company or now held in inventory is not of good workmanship or material, except for contingent adjustments on goods and equipment heretofore sold not to exceed \$40,000, or fails to comply with any express or implied warranty made or to be made upon the sale thereof by the Company.

N. Annexed hereto as Exhibit C is a brief description of the patents, trademarks, trade names and copyrights owned by or registered in the name of the Company or in which it has rights of any nature. The Company owns or possesses adequate licenses or other rights to use all patents, trademarks, trade names and copyrights necessary to conduct its business as now operated by it, and has not received any notice of conflict, and to the knowledge of Sellerary attractant and the state does not exist any conflict, with the asserted rights of others with respect thereto. The Company is not a licensor in respect of any patents, trademarks, trade names, copyrights or applications for any thereof.

es carago ser mais subtrate a disposa recita as

hibit D annexed hereto, copies of which have beem delivered to Dayer by the Sellers, the Company is not a party to ore bound by any contract not made in the ordinary course of business and is not a party to or bound by any (1) contract for the employment of any officer or individual employee which is not immediately terminable without cost or other liability to the Company on or at any time after the Closing Date, (2) contract for the future purchase of materials, supplies, equipment or services not cancellable by the Company on 90 days notice, (3) distributor or sales agency or advertising contract not terminable by the Company upon 60 days notice, (4) contract with any labor union, (5) contract for the future sale of its products at prices less than the net early buy scheduled list prices set forth in Exhibits D1 and D2 attached hereto, (6) indenture, mortgage, loan or credit agreement, (7) bonus, pension, profit sharing, retirement, stock option, stock purchase, hospitalization, insurance or other plan or agreement providing benefits to any employee or shareholder of the Company, or (8) lease (other than the leases referred to in the foregoing subsection J). The Company has in all material respects performed all obligations required to be performed by it, and is not in default, under any of the agreements & other instruments to which it is a party and no event has occurred and is continuing under the provisions of any such agreement or instrument which, with the lapse of time or the giving of notice, or both, would constitute a default or an event of default thereunder.

P. To the best of the knowledge, information and belief of Sellers, the Company is - - -

the ordinary course of business and is not a party to or bound by any oral contract of the nature described in the foregoing subsection 0.

Q. All the insurable properties of the Company are insured for the benefit of the Company against all risks usually insured against by persons operating similar properties in the localities where such properties are located, under valid and enforceable policies issued by insurers of recognized responsibility and such insurance is in such amount as is required to reasonably protect the Company against the risks covered thereby. The Sellers will cause the Company to continue to reintain such insurance coverage to and including the Closing Date.

R. Since . August 31, 1967, .. the Company has not, except as otherwise contemplated hereunder or provided herein or in any written schedule or exhibit delivered hereunder (1) issued any shares of stock, notes, warrants, options or other corporate securities, (2) incurred any obligation or liability, absolute or contingent, except current liabilities incurred, and obligations under contracts entered into, in the ordinary course of business, (3) discharged or satisfied any lien or encumbrance, or paid any obligation or liability (absolute or contingent) other than current liabilities shown on said balance sheet of the Company as at August 31, 1967, and . current liabilities incurred since said date in the ordinary course of business (4) declared, set aside or cade any payment or distribution to shareholders or purchased or redeemed any of its capital stock, (5) mortgaged, pledged or subjected to lien, charge or any other encumbrance any of its assets, tangible or intangible, (6) sold, assigned- - -

any debts or claims, except in the ordinary course of business, (7) suffered any extraordinary losses or waived any rights of substantial value, (8) entered into any material transaction other than in the ordinary course of business, (9) mude capital expenditures in excess of an aggregate of \$50,000, (10) sold, assigned or transferred any patents, trademarks, trade names, copyrights or other intengible assets, or (11) granted any general or uniform increase in the rates of pay or benefits incidental to employment of its employees; whether or not in collective bargaining units. The net worth of the Company which will be shown on the balance sheet of the Company as at September 30, 1957 to be prepared and certified by Lybrand, Ross & Montgomery pursuant to their audit which they are now conducting, will be not less than the net worth shown on the August 31, 1967 balance sheet of the Company referred to in Section 12 - hereof, less \$200,000.

- ment and compliance with the provisions hereof by the Sellers will not conflict with, or result in, any breach of any of the terms, conditions or provisions of, or constitute a default under, or result in the creation of, any lien, charge or encumbrance upon any of the properties or assets of the Corrany pursuant to any corporate charter, by-law, indenture, mortgage, lease, agreement or other instrument to which the Company is a party or by which it is bound.
 - T. Between the date hereof and the Closing Date, the Company will not, without the prior written consent of Puyer, do any of the things listed in clauses (1) to (11), inclusive, of the foregoing subsection R.

- W. No representation or warranty of Sellers on softential Schemes Schemes Schemes in this Agreement, or in any schedule, certificate or other watern furnished or to be furnished to Buyer by Sellers, Schemes Schemes
 - 2. Representations and Certain Agreements of Buyer.

 Buyer represents, warrants and agrees as follows:
 - A. Buyer is a corporation, duly organized, validly existing and in good standing under the laws of the State of New York.
- B. The execution and performance of this Agreement have been duly authorized by the Board of Directors of Buyer and Buyer has the corporate power to carry out the transactions on its part to be carried out hereunder.
- C. The shares of Class A Stock of Buyer to be delivered hereunder to the Seller #11, when so delivered, be duly and validly authorized and issued stock of Buyer, fully paid and non-assessable.

to Rayer, free and clear of all liens, pledges and encomprances of my kind, certificates for the number of shares of Common Stock of the Company sat forth opposite their respective names at the foot hereof, duly endersel in blank, with signatures guaranteed, and with all requisite stock transfer stamps attached.

In consideration therefor and in complete and full payment for all of the foregoing shares of stock to be delivered by Sellers hereunder, Euger shall (i) at the Closing pay to Samuel Levitt for and on behalf of all the Sellers, \$11,200 in cash, and (ii) within one hundred twenty(120) days after the end of each of the Company's fiscal years ending in 1953, 1959 and 1970, or mithin five (5) days after the determination referred to in subsection C(iv) below with respect to each such fiscal year, has become binding upon Sellers, whichever be later, issue and deliver to Sellers as hereinafter provided, such number of whole shares, if any, of Euyer's Class A Stock which in the aggregate shall equal up to but not exceeding \$2,500,000 of. in value 20% of the Company's pre-tax earnings/invexcessiof such earnings \$500,000 for each such fiscal year. For purposes of this Section 3.3., the Class A Stock of Euyer shall be valued at dividends, stock splits, reclassifications and like transactions efter the date hereof. All such shares of Euger's Class A Stock to be issued and delivered to Sellers hereunder shall be issued and deliver to Sellers in proportion to the respective number of shares of Common Stock of the Company set forth opposite their respective names at the foot hereof.

C. For purposes of Section 3.B.:

Shall change any such fiscal year to end on November 30 in order to coincide with its own fiscal year, on November 30 of such year, provided that such changed fiscal year shall cover a period of no less than twelve calendar months.

- (ii) The pre-tax earnings of the Company for each fiscal year shall be determined by the independent accounting firm then servicing the books of Euger in accordance with generally accepted accounting principles applied on a consistent basis.
- earnings of the Company shall be based on the business and assets of the Company as it is being operated on the date of the Closing hereunder. If such business is operated as a corporate division, whether by a marger or consolidation with or into Buyer, or a subsidiary of Buyer, or for any other reason, then the pre-tax earnings shall be computed on the basis of pre-jax earnings attributable to the assets and business owned or conducted by the Company as of such marger consolidation etc. Nothing herein contained shall prohibit the Buyer from adding other products to the business of the Company or eliminating any products carried or to be carried by the Company whether it be operated as a separate corporation or division.
- (iv) The independent accounting firm employed by the Company as its auditors shall make all determinations with respect to the amount of pre-tax earnings required to be determined under Section 3B and 3C and the number of shares of Class A Stock of Buyer deliverable hereunder. The Company shall

each fiscal year of the Company. Such determination shall be binding and conclusive upon Sellers unless within ten (10) days after delivery thereof all of the Sellers notify Buyer of their objections to such determination. The Sellers shall thereupon designate a firm of certified public accountants to confer with the Company's auditors for the purposes of resolving any disputes in connection with such determination and such Sellers auditors' shall have reasonable access to such books and records as may be necessary to resolve such dispute.

In the event that the accountants designated by the Sellers and the Company's auditors shall not be able to resolve any such dispute within fifteen (15) days after the receipt by the Euver of the Sellers' objections, the matter shall be submitted to Price Waterhouse & Co., whose determination shall be final and conclusive. The fees and expenses incurred in connection with the engagement of Price Waterhouse & Co., as herein provided, shall be borne one-half by the Company and one-half by Sellers, each of whom shall be jointly and severally liable for one-half of the total costs.

4. Investment Representations.

A. Each Seller represents and covenants that any Class A Stock of Euger to be acquired by him hereunder will be acquired by him for investment, without any intention of reselling or distributing same and that upon each delivery

stock, deliver to Buyer a letter, dated as of the day of delivery of such stock, in such form as may reasonably be acceptable to counsel for Buyer, confirming that such stock is taken for investment, without any intention of reselling or distributing same.

- at the office of Hays, Sklar & Herzberg, 200 Park Avenue, C. Hew York, New York, at 2:00 P.M., on Nouchber 15, 1967, or at such other time and place as the parties shall mutually agree upon in writing. The term "Closing Date" as used herein shall mean the date on which the Closing hereunder shall be consummated.
- Obligations. The respective obligations of Buyer and Sellers hereunder are at the option of Buyer and of the Sellers respectively, subject to the conditions that on or before the Closing Date no action or proceeding by or before any court or other governmental body shall have been instituted or threatened to restrain, prohibit or invalidate the transactions contemplated by this Agreement or which might affect the right of Buyer to own and operate as its subsidiary after the Closing Date the business and property of the Company.
- 7. Conditions Precedent to the Obligations of Euyer.
 Unless the following conditions are satisfied on or before
 the Closing, the Euyer shall in its discretion not be obligated
 to consumnate the transactions contemplated herein:

- A. Euger shall how have discovered any material ergor, misstatement or omission in the representations and warranties made by Sellers and all the terms, covenants and conditions of this Agreement to be complied with and performed by Sellers or the Company, on or before the Closing Date, shall have been complied with and performed, provided, however, that anything herein to the contrary notwithstanding and without affecting the efficacy or the validity of the warranties and representations made herein, Buyer agrees that it will not refuse to close on the grounds that this Section /A has not been satisfied, if the effect of any breaches, misstatements and misrepresentations by Sellers herein is to reduce the Company's net worth as of September 30, 1957 by not more than \$400,000 from the net worth as shown on the Company's balance sheet as of August 31, 1957 referred to In Section 1E herein. Whether or not the balance sheet as of September 30, 1957, as prepared by the accountants shall reflect a liability for income taxes due with respect to the year ended September 30, 1955, if the loss suffered during the year ended September 30, 1967 shall result in a carry back credit of at least that amount, then unless such carry back shall be reflected as an asset on such balance sheet, such liability shall be eliminated in determining the net worth of the Commany as of September 30, 1957 for all the purposes of this Agreement.
- B. Saguel Levitt shall have entered into a Sales Representative's Agreement with the Company in substantially the form attached hereto as Exhibit G, which Agreement is assignable by Levitt to a corporation owned or controlled by Levitt (and Samuel Levitt hereby agrees to enter into such

Sales Representative's, Agreement at or prior to the Closing) and on the Closing Date such Agreement shall be in full force and effect.

- c. The business and properties of the Company shall not have been adversely affected in any material way as the result of any fire, explosion, accident, riot, civil disturbance, strike, boycott, lockout, flood, drought, storm, earthquake, embargo, or other casualty or Act of God or the public enemy. There shall have been no changes in the business, properties or financial condition of the Company since August 31, 1967 which would have a material adverse affect on the value of the business of the Company, except as contemplated herein.
- D. All actions, proceedings, instruments, opinions and documents required to carry out this Agreement or incident thereto, and all other related legal matters, shall have been approved by Messrs. Hays, Sklar & Harzberg, counsel for Euyer.
- E. Buyer shall have received the opinion of George Feiweil, Esq., counsel for Sellers, addressed to Buyer

factory to Euger and its counsel, to the offeet that:

- (1) The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of New York, and has the corporate power to own the property it owns and to carry on the business it carries on, and is duly qualified to do business and is in good standing as a foreign corporation in all jurisdictions in which the character of its properties or the nature of its business make such qualification necessary.
- (2) The Company's authorized capital stock consists of two hundred shares of Common Stock, without par value, 100 shares of which are issued and outstanding, fully paid and non-assessable and owned by the Sallers in the amounts set forth opposite their respective names at the foot hereof.
- (3) No provision of the Articles of Incorporation or the Ey-Laws of the Company, or any contract known to said counsel (after due inquiry) to which the Company is a party or by which either is bound, requires the consent or authorization of any person; firm or corporation as a condition precedent to the consummation of this Agreement or the transactions contemplated herein.
- (4) This Agreement has been duly executed and delivered by the Sellers and is a valid and binding obligation of each of the Sellers in accordance with its terms and that upon the

set forth opposite their respective names at the foot hereof, as contemplated herein, Buyer will be fully vested with all the right, title and interest in and to all the outstanding stock of the Company, free from any claims and encumbrances of any nature whatsoever.

- (5) The Sales Representative's Agreement referred to in Section 43 herein has been duly executed and delivered by the Company and Samuel Levitt, and is/valid and binding obligation of the Company and Samuel Levitt in accordance with its terms.
- any court or other governmental body shall have been instituted or threatened to restrain, prohibit or invalidate the transactions contemplated by this Agreement or which might affect the right of the Company to own, operate and control after the Closing Date, its assets, property and business.
- F. Except as otherwise contemplated herein, the representations and warranties made by the Sellers in this Agreement or in any instrument delivered pursuant thereto, shall be true and correct, on and as of the Closing Date, with the same effect as though all such representations and warranties had been made on and as of the Closing Date, and Euyer shall have received a certificate, dated the Closing Date, and signed by each of the Sellers to the foregoing effect.

Company. Sellers agree at or before the Closing to cause all necessary corporate proceedings to be taken (in form and substance satisfactory to counsel for Euger) to elect designees of Euger (whose names shall be furnished to Sellers no later than five (5) business days prior to the Closing Date) as directors of the Company.

H. Each of the Sellers shall have executed and delivered to the Company (and Sellers hereby agree so to do) general releases of any and all claims they may have against the Company, except for the loan of Samuel Levitt to the Company in the principal amount of \$103,630 plus interest thereon on unpaid balances at the rate of 45 per annum from the Closing Date to the date of repayment.

8. Conditions Precedent to the Obligations of Sellers.
The obligations of the Sellers are, at the option of all the
Sellers (acting together) subject to the condition that, on
or prior to the Closing Date:

A. The representations and warranties made by Euger in this Agreement shall be true and correct, on and as of the Closing Date, with the same effect as though all such representations and warranties had been made on and as of the Closing Date.

B. Buyer shall have delivered to Sellers a certificate signed by the Secretary or an Assistant Secretary of Buyer and under its corporate seal certifying the resolutions of the Eoard of Directors of Buyer authorizing the execution and delivery of this Agreement.

c. Buyer shall have delivered to Sellers an opinion of Hays, Sklar & Merzberg, counsel for Euger, addressed to Sellers and dated the Closing Date, in form and substance satisfactory to the Sellers and its counsel, to the effect that:

Canized, vehicly existing and in good standing under the laws of the State of New York.

(2) The Euger has full authority to make, execute, deliver and perform this Agreement and this Agreement has been duly authorized and approved by proper corporate action of Euger and constitutes the valid and legal binding obligation of Euger in accordance with its terms.

NO SECTION 9.

io. Indemnification by Sallers.

A. Sellers, jointly and severally, a sect indemnify and hold the Euger harmless against and in respect of losses sustained by it by reason of the following: claims against the Company of any nature,
whether accreed, absolute, contingent or
otherwise existing at September 30, 1967, to
the entent not reflected or reserved against in
full in the Company's balance sheet as at
September 30, 1967 referred to in Section 15
hereof.

- (ii) Any and all damage or deficiency resulting from any misrepresentation, breach of warranty or covenant or non-fulfillment of any obligation on the part of the Sellers hereunder not otherwise embraced within subsection A(i) above.
- (iii) Any and all actions, suits and proceedings, demands, assessments, judgments; costs and legal and other expenses incident to the foregoing.
- B. Euger shall have the right, at its election, to charge any amount due or payable to it by Sellers under Sellers' indemnity herein contained including the amount, if any, by which the net worth of the Company, as shown on the Company's balance sheet as at August 31,1957, referred to in Section 1(e) herein, exceeds by more than \$200,000 the net worth of the Company as shown on the certified balance sheet of the Company as at September 30, 1967, referred to in Section IR herein, against the. shares of Buyer's Class A Stock to be delivered to Sellers pursuant to Section 3 and to deduct therefrom such number of whole shares of Class A Stock as will fully reimburse Buyer for the amount of its claim against Sellers, or any of them, (for purposes herein, such shares of Euger's Class A Stock shall be valued as provided in Section 3); provided that Sellers shall have the right within ' thirty (30) days after notice of any claim by Euger hereunder to sat: fy such claim or deficiency in lieu of having such claim set off against the Class A Stock deliverable harmuniars.

the date of this Agreement (a) Sellers shall efford, and shall cause the Company to afford, to the officers and authorized representatives of Euger, free and full access to the plants, properties, books and records of the Company in order that Euger ray have full opportunity to make such investigation as it shall desire to make of the affairs of the Company, and (b) Sellers shall furnish, and cause the officers of the Company to furnish, to Buyer and its authorized representatives such additional financial and operating data and other information as to the business and properties of the Company as Euger shall from time to time reasonably request.

- All representations and warranties made by Sellers in this Agreement, or on the Closing Date, as required hereunder, shall remain operative and in full force and effect, regardless of any investigation made by or on behalf of Buyer, and shall survive delivery of the Common Stock by Sellers to Buyer and any delivery of Class A Stock by Euger to Sellers.
- a finder's fee in the event that the transaction contemplated by this Agreement shall be consummated. Sellers represent and warrant to Buyer and Euger represents and warrants to Sellers that all negotiations relevant to this Agreement have been carried on by them without the intervention of any other broker or finder. Sellers, jointly and severally, agree to indemnify

held Sellers imembers, against and in respect of any claim for brokerage or finder's commission in breach of their respective covenants herein contained.

that for a period of three (3) years from and after the

Closing Date he will not in any manner, directly or indirectly,
engage in the business which competes with any of the businesses
in which the Company may not be engaged and he will not, directly
or indirectly, own, manage, operate, join, control or participate
in, the ownership, management, operation or control of, or be
employed by, or connected in any manner with, any corporation;
firm or business that is so engaged. It is understood and
agreed that the remedy at law for breach by any the Sellers
of the covenants contained in this Section 14 will be inadequate,
and that the Company and Buyer shall be entitled to injunctive
relief. Such covenants shall constitute independent and
separable covenants which shall be enforceable, notwithstanding
any rights or remedies which Sellers may have under any other
provision of this Agreement.

15. Motices. Any notice, request or other document to be given hereunder to any party shall be in writing and delivered personally or sent by registered mail, postage prepaid, if to one of the Sellers, to the address filed by such Seller in writing with Euyer, or if no such address shall have been so filed, to such Seller, in care of Samuel Levitt, 230 Fifth Avenue, New York, N.Y. with copy to George Feiwell, 33 North LeSalle Street, Chicago, Illinois; and if to Buyer, addressed to Buyer, attention of its President, 165 Huguenot Street, New Rochelle, New York, with a copy to Messra. Hays, Sklar & Herzberg, 200 Park Avenue, New York, New York, New York, Olif, attention Nathenlel Whitehorn, Esq.

- ment shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, representatives, successors and assigns. Nothing in this Agreement, express or implied, is intended to confer upon any person other than the parties hereto and their respective successors in interest, as aforesaid, any rights or remedies under or by reason of this Agreement.
- :17. Governing Law, etc. This instrument contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby and this Agreement may not be changed or terminated orally, but only by an instrument in writing signed by the parties hereto. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York.
- and agree that pending the Closing they will cause the Company, from and after the Closing hercunder, not to borrow any funds, secure any advances, pledge or encumber any of its assets, from or with The First National City Bank, Haubschman Division, or with any other party,

in writing by John Harmyk. Sellers further covenant and agree that simultaneously with the execution of this Agreement, the Company will amend its bank resolution with The First National City Bank, 55 Wall Street Branch, so as to require the signature of John Harmyk as a required co-signer on all checks drawn on the account of the Company and to keep such banking arrangements in full force and effect until the Closing hereunder and until said Closing, to maintain its banking arrangements as they now exist and not secure any additional depositories or banking accommodations.

19. Maiver. Failure by Euger to exercise any right, remedy or option under this Agreement, or delay by Euger in exercising the same, will not operate as a waiver and no waiver by Euger will be effective unless it is confirmed in writing and then only to the extent specifically stated. It is specifically understood that, without limiting the foregoing, the assent to Euger to the Closing hereunder, shall not be deemed a waiver of its right to reimbursement from Sellers as provided herein in the event that the net worth of the Company as shown on the balance sheet as at September 30, 1967, to be prepared and certified as provided in Section 1R hereunder is not as represented herein.

19. Bank Accounts. Sellers coverant and agree, discultaneously with the execution of this Agreement, to amend its bank resolution with the First Mational City Bank, 55 Wall Street Branch, so as to require the alguature of John Marnyk as a required co-signer on all cheeks drawn on the account of the Company, and to keep such banking arrangements in full force and effect until the Closing hereunier and until said Closing, to maintain its banking arrangements as they now exist and not secure any additional depositories or banking accommodations.

20. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

IN WITHESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

POLORON PRODUCTS, INC.

By

LEVITT MANUFACTURING CORPORATION

Stock Ownership
in Levitt Manufacturing Corporation

Samuel Levitt - 48 shares

Jay Levitt - 21 shares

Carl Levitt - 21 shares

Exhibit A

Clements Box Company v. Levitt Manufacturing Corp.
Amount in dispute approximately \$16,000.

Detroit Tool Company v. Levitt Manufacturing Corp.

Amount in dispute approximately \$5,000. Accrued legal

expenses to Lemuel T. Jones \$2,300 plus costs.

Levitt Manufacturing Corp. v. Yardman of Illinois pending in the United States District Court for the Northern
District of Illinois.

Levitt Mfg. Corp. v. Masco, et al., pending in the Circuit Court, Milwaukee, Wisconsin. Amount in dispute approximately \$38,000.

Miscellaneous collection matters wherein Levitt is plaintiff.

EXHIBIT B

Lease by and between the Company and Garden City Land Corporation, dated June 28, 1965, covering the Company's plant in Michigan City, Indiana.

EXHIBIT C

U. S. Trademarks

- 1. Gardex
- 2. Fleetwood Application Pending
- 3. Stallion
- 4. Fleetlawn Application Pending

EXHIBIT 1 TO AMENDED COMPLAINT . EXHIBIT D

Leases

- Lease dated December 1, 1956 by and between Associate Leasing Corporation of Indiana, Lease, and Levitt Manufacturing Corporation.
- Lease dated January 4, 1967 by and between Associate Leasing Corporation of Indiana, Lessor, and Levitt Fanufacturing Corporation.
- 3. Lease dated February 28, 1967 by and between Associate Leasing Corporation of Indiana, Lessor, and Levitt Manufacturing Corporation
- Lease of Pontiac, Ford and Plymouth Sedans, a Ford
 Econaline and miscellaneous truck leases, which truck leases
 are terminable on thirty days notice.

Employment Contracts

Employment Agreement with Frank Wolf, at \$7,500 per year, as of June 30, 1966, for a period of five years.

Contracts for Future Sale of the Company's Products at Prices Less than the Net Early Buy Scheduled List Prices

Customer		Model No.		.Unit Early	Eug Pric
Alden's	•	8732		net and no	
Camble's	•	17832	\$293.98		

EMMEDIT D (cont.)

Labor Union Contract

Collective Pargaining Agreement with United Steel Workers.

Loan Agreements, etc.

First National City Pank, Hubschman Division - Factoring and Receivable Financing Agreement.

PERIOD NY ... ILNICA W. P. No.

Balance Sheet, as at September 30, 1967

L. L	
Assets	
Current Assets:	1
Trade receivables:	\$ 7 100 9;
Accounts	7106635325
Account receivable-Federal Income Tax Refund	9816219
	1168 86,751
Inventory at the lower of estimated	150 000 00 : 1018 86 5
Prepaid expenses	10625639
	3//3.2
Total current assets	20917257
Equipment, et cost:	
Office equipment	25189262
Tooling and dies	47719683
Lensehold improvements	80768036
Less, Accumulated depreciation	25581380 5518665
Patents and trade name	15000
	-
Total Assets	\$ 2645092
10tal Assets	2645072
Ex 2	
4/2	

Correct linsilities: And stockholders' Equity Correct linsilities: Brown overdrafts Notes payable: Brown object Other, current portion Notes payable - Talcott Accounts payable Employees' Tours withheld Served excuss Darranty claims payable Total current linsilities Notes payable Less Current pactien Lours payable, stockholders Lours payable, stockholders Total linsilities Stockholders' equity: Capital stock, no par value: Authorized 200 shares; Outstanding 100 shares Retained earnings (deficit) Total stockholders' equity: Total liabilities and stockholders' equity \$2680234		1
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(3/654629	Pillstanding 100 Shares	10000000
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	osal stockholdris' equibu	
2645692 34	72-11111	
	letal lindilities and stockholders' equit	26/5092 34

LEVITT MANUFACTURING CORPORATION

Report on Examination of Financial Statements for the fiscal year ended September 30, 1967

LYBRAND, ROSS BROS. S. MONTGOMERY
CERTIFIED PUBLIC ACCOUNTANTS
SOUTH BEND OFFICE

E13

CONTENTS

		Pages
Auditor's Report		1 2
	: : : : : : : : : : : : : : : :	
Financial Statements: Balance Sheet Notes to the Balance Sheet		3 4
Supplementary Financial Data	e in the second second	5
Statement of Income		
Statement of Income		0

LYBRAND, R. S BROS. & MONTGOMERY
CERTIFIED PUBLIC ACCOUNTANTS

COOPERS & INTRANCO SPONDER TO CHEENE ESTATE COTINUENT SELECTED

To the Eoard of Directors of
Levitt Manufacturing Corporation:

We have examined the balance sheet of Levitt .
Manufacturing Corporation as at September 30, 1967. Our
examination was made in accordance with generally accepted
auditing standards, and accordingly included such tests of
the accounting records and such other auditing procedures
as we considered necessary in the circumstances, except as
stated in the following paragraph.

We observed the taking of the physical inventory at the balance sheet date and satisfied ourselves as to quantities. The prices used in valuing the inventory were determined by company personnel. We were not able to satisfy ourselves as to the pricing of the inventory and therefore, are not able to express an opinion on the inventory or on related accounts that are affected by inventory such as cost of sales, income tax liability and expense, net income and retained earnings. Because of the materiality of these matters, we express no opinion on the accompanying balance sheet taken as a whole.

(However, in our opinion, the assets, } billities ... and capital included in the accompanying balance sheet, other than inventory and the related accounts referred to above, are fairly presented in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

Syprante, Roce Bris & Monty ones

South Bend, Indiana. November 20, 1967

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A	SSETS	*.n *	F
Current assets:			. Cu
		:\$. 7,100.97 .	1
Trade receivables: Accounts Notes Account receivable, féderal	\$1,056,363. 98,462.	25 19	- 1
income tax refund	4,042.0	07	
	1,168,867.	51	1
Less, Allowance for doubtful a	accounts150,000.0	00 1,018,867.51]
Inventory, at the lower of estimated cost or market		1,062,563.98:	1
Prepaid expenses		3,193.32 -	No.
Total current assets		2,091,725.78	:
Equipment, at cost: Office equipment	66.366		Lo.
Factory equipment Tooling and dies Leasehold improvements	66,166.9 251,892.6 477,196.8 12,423.9	62 33	St
Less, Accumulated depreciation	807,680.3 255,813.8	36 30 551,866.56 :	
Patents and trade name		1,500.00	:
Total assets		\$2,645,092.34	

The accompanying notes are an integral part of the financial statements.

LIABILITIES AND STOCKHOLDERS' FOUTTY

	PIOCYHOTDERS, EGALLA.	
Current liabilities:		
Bank overdrafts		
Notes payable: Bank Vendors Other, current portion	\$1,004,967.08 234,007.45 60,000.00 1,298,97	
Note payable, Talcott Accounts payable Employees' funds withheld Accrued expenses V Tranty claims payable	130,05 897,09 137,48 43,89 57,00	55.48 23.35 25.35 23.28
Total current liabilities	2,669,83	
Notes payable Less, Current portion Loans payable, stockholders	240,000.00	
Total liabilities	111,80	7.49
Stockholders' equity: Capital stock, no par value: Authorized 200 shares:	2,961,63	8.63
outstanding 100 shares Retained earnings (deficit)	100,000.00 (416,546.29)	
Total stockholders' equity	(316.54)	5.201
Total liabilities and stockho	olders' equity \$2,645,090	

for the fiscal year ended September 30, 1967

- Note A: The corporation executed a five year lease of real property with a five year renewal option in Michigan City, Indiana on June 28, 1966. The terms of the lease call for an annual rental of \$88,000. In the second five years, property taxes assessed for those years exceed by 10% the property taxes assessed in 1965.
- Note B: Notes payable consist of the following notes:

Notes payable - Bank of \$1,004,967.08 arose from accounts receivable financing through the First - National City Bank of New York City. The bank holds assigned collateral accounts receivable of \$933,363.05 and a security interest in inventory and machinery and equipment.

Notes payable - Vendors consist of a series of notes payable to twelve vendors in various monthly instalments and bear interest at rates from 6% to 6 3/4%.

Notes payable - Other is a non-interest bearing note which arose from the sale of fixed assets. The note calls for principal payments of \$60,000 on September 30, 1968, 1969, 1970 and 1971.

- Mote C: The Note Payable Talcott arose in May, 1966 from the financing of purchases from a former supplier. This obligation bears interest at 8% per annum after October 1, 1967. The principal sum is payable in six equal consecutive monthly instalments commencing November 26, 1967 of \$21,676.08 together with accrued interest.

 James Talcott, Inc. holds a security interest in accounts receivable of \$15,974.47 and the corporation's promissory note dated October 31, 1966 which is personally guaranteed by a corporate officer.
- Note D: Depreciation expense of \$197,999 in the fiscal year ended September 30, 1967 has been deducted in the statement of income.
- Note E: Warranty expense has been provided for on the basis of warranty claims submitted to the company.

SUPPLEMENTARY FINANCIAL DATA

The balance sheet referred to in our opinion on ages 1 and 2 are set forth on pages 3 and 4, inclusive, of this aport. Our examination was made primarily for the purpose of endering an opinion on this balance sheet, taken as a whole. The ther data included in this report on page 6, although not considered necessary for a fair presentation of the financial cosition, is presented primarily for supplemental analysis purposes. This additional information has been subjected to the audit procedures applied in the examination of the balance sheet.

Because we were not able to satisfy ourselves on the pricing of the ending inventory, we are not able to express an ppinion on the appended statement of income which includes related accounts which are affected by inventory such as cost of sales, income tax expense, net loss and retained earnings (deficit).

Lybrand, Less bors & Wontgomery

South Bend, Indiana Sovember 20, 1967

STATEMENT OF INTOME AND RETAINED EARNINGS (DEFICIT)
for the fiscal year ended September 30, 1967

	eles	
		\$6,251,372.60
	ost of sales	· · · · · · · · · · · · · · · · · · ·
	Gross profit	5,717,584.34
		533,788.26
-	lling, general and administrative expenses:	
-	General and administrate	529,853.77
1		1,200,546.14
1	Loss from operations	
	her income, sale of tooling	665,757.88
-		50,000.00
-	Loss before provision for federal income tax	•
Į		616,757.88
1	ovision for federal income tax	
I	Net loss	(84,012.21)
İ		532,715.67
i	tained earnings, October 1, 1966	
		116,199.38
-	tained earnings (deficit), September 30, 1967	
1		\$ (416,546.29)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC., a New York Corporation.

Plaintiff,

:

:

72 Civ. 3884

-against-

LYBRAND, ROSS BROS. & MONTGOMERY, (now known as Coopers & Lybrand)

ANSWER AND COUNTERCLAIMS

Defendant.

Defendant Lybrand, Ross Bros. & Montgomery ("Lybrand"), by its attorneys Hughes Hubbard & Reed, responds to the amended complaint herein as follows:

ANSWER

- 1. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 of the amended complaint, except admits on information and belief that plaintiff Poloron Products, Inc. ("Poloron") is a New York corporation with a place of business in New York.
- 2. Admits each and every allegation contained in paragraph 2 of the amended complaint.
- 3. Denies each and every allegation contained in paragraph 3 of the amended complaint, except admits that plaintiff purports to allege a claim arising under the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240. 10b-5, promulgated thereunder, and purports to base venue on § 27 of said Act, 15 U.S.C. § 78aa.

- 4. Admits each and every allegation contained in paragraph 4 of the amended complaint, except denies that plaintiff ever delivered to the Sellers any stock pursuant to the terms of the Purchase Agreement, and refers to said Purchase Agreement for its content.
- 5. Admits, on information and belief, each and every allegation contained in paragraph 5 of the amended complaint, except denies that Lybrand prepared the 1956 balance sheet of Levitt Manufacturing Corporation ("LMC").
- 6. Admits each and every allegation contained in paragraph 6 of the amended complaint, except refers to paragraph 1E of the Purchase Agreement for its content.
- 7. Admits each and every allegation contained in paragraph 7 of the amendel complaint (assuming the figure "15" should be "1R"), except refers to paragraph 1R of the Purchase Agreement for its content.
- 8. Admits each and every allegation contained in paragraph 8 of the amended complaint, except refers to paragraph 7 of the Purchase Agreement for its content.
- 9. Denies each and every allegation contained in paragraph 9 of the amended complaint, except admits that Lybrand was informed in November, 1967 that the planned closing date of a stock purchase agreement between plaintiff and the owners of the stock of LMC was December 1, 1967 (the "Closing Date").
- 10. Denies each and every allegation contained in paragraph 10 of the amended complaint, except admits that in the course of its examination of the books and records of LMC, Lybrand wrote out at least one handwritten draft of LMC's balance sheet.

11. Denies each and every allegation contained in paragraph 11 of the amended complaint, except admits that on or about Pebruary 9, 1968, Lybrand delivered a report (the "Report") upon the balance sheet of LMC, a copy of which is attached to the amended complaint as Exhibit 3; and Lybrand specifically states (i) that at closing on December 1, 1967 plaintiff and Sellers were in possession of a tentative, uncertified draft of a balance sheet of LMC containing figures which all understood to be subject to correction; (ii) that the document annexed to the amended complaint as Exhibit 2 is a deceptive and misleading copy of said tentative balance sheet because the words "Draft 12/1/67" have been deleted, and a true photocopy of said tentative balance sheet is annexed hereto as Exhibit A; and (111) that as indicated in a letter of agreement executed at closing by plaintiff and Sellers (a copy of which is annexed hereto as Exhibit E), plaintiff did not rely on said tentative balance sheet with respect to the accounts challenged in this action.

- 12. Admits each and every allegation contained in paragraph 12 of the amended complaint, except refers to the Report for its content.
- 13. Denies each and every allegation contained in paragraph 13 of the amended complaint, except admits that on December 1, 1967 plaintiff and the Sellers consummated the Purchase Agreement.
- 14. Denies each and every allegation contained in paragraph 14 of the amended complaint.
- 15. Denies each and every allegation contained in paragraph 15 of the amended complaint, except states, on information and belief, that plaintiff's auditors for the fiscal years ended September 30, 1968 and September 30, 1969 reported

C Mark Control

the discovery of approximately \$122,687.00 and \$59,095.00, respectively, in what they believed to be liabilities of LMC existing as of September 30, 1967 unaccounted for in the Report.

- 16. Denies each and every allegation contained in paragraph 16 of the amended complaint, except admits that Lybrand used the mails and other means of interstate communication in connection with its preparation of the Report.
- 17. Denies each and every allegation contained in paragraph 17 of the amended complaint.

FIRST DEFENSE

18. The amended complaint fails to state a claim against Lybrand upon which relief can be granted.

SECOND DEFENSE

19. Plaintiff has failed to aver the circumstances constituting Lybrand's alleged fraud with the particularity required by Rule 9 of the Federal Rules of Civil Procedure.

THIRD DEFENSE

20. The amended complaint is barred by the applicable statute of limitations.

FOURTH DEFENSE

Levitt (the "Levitts"), the persons who sold plaintiff the LMC stock, agreed in paragraph 10A of the Purchase Agreement, jointly and severally, to indemnify and hold plaintiff harmless against and in respect of losses sustained by it by reason, inter alia, of any and all liabilities or other claims against LMC of any rature whether accrued, absolute, contingent or otherwise existing at September 30, 1967 to the extent not reflected or reserved against in full in LMC's balance sheet as at September 30, 1967.

- 22. Pursuant to paragraph 7B of the Purchase Agreement, and as a condition precedent to the obligations of plaintiff, Samuel Levitt entered into a sales representative agreement (the "Sales Representative Agreement") with LMC, a copy of which is attached hereto as Exhibit C. Paragraph 12 of the Sales Representative Agreement authorized LMC (renamily Poloron Products of Indiana, Inc. ("Poloron Indiana") after the purchase) to set off against commissions payable thereunder any amounts owing under the indemnity provision of the Purchase Agreement.
- 23. On information and belief, plaintiff, despite this right of set-off, through its wholly-owned subsidiary Poloron Indiana, has paid sums in excess of \$1,500,000 in commissions under the Sales Representative Agreement to Samuel Levitt's assignee, the Dynamark Corporation ("Dynamark"), a corporation organized and controlled by the Levitts. Said payments exceed the amounts of liabilities presently charged to Lybrand.
- 24. Plaintiff has waived, or is estopped from asserting, any claim against Lybrand.

FIFTH DEFENSE

25. Plaintiff has failed to mitigate its alleged damages.

SIXTH DEFENSE

26. On information and belief, the operations of Poloron Indiana have been profitable and plaintiff has not been damaged.

SEVENTH DEFENSE

27. Repeats and realleges each and every allegation contained in paragraphs 21 and 22 above as though alleged in full hereat.

- 28. Paragraph 10B of the Purchase Agreement authorized plaintiff to set off any amounts owing under the indemnity provision of the Purchase reement against stock in plaintiff otherwise due the Levitts under the Purchase Agreement.
- 29. Plaintiff has delivered no stock whatsoever to the Levitts under the Purchase Agreement and, on information and belief, has made set-offs in excess of \$300,000 against stock otherwise due the Levitts under the Purchase Agreement and against commissions otherwise due under the Sales Representative Agreement. Plaintiff has thus recouped far more than it paid for the LMC stock, and has therefore not been damaged.

EIGHTH DEFENSE

- 30. The sale of securities involved in the present action has been the subject of prior actions, and in 1971 such ar action (the "First Action") was pending before this Court. Poloron and Lybrand were parties thereto, as were the Lyvitts, Dynamark and Poloron Indiana.
- 31. On or about June 28, 1971 all parties entered into a stipulation dismissing the said action pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.
- 32. Prior to the dismissal, the Levitts and war mark released any and all claims against Poloron for stock distinder the Purchase Agreement as well as for commissions due under the Sales Representative Agreement. In return, Poloron executed a general release of its claims against the Levitts arising out of the LMC stock purchase.
- 33. Any claim which Poloron might have had against Lybrand arising out of the purchase of LMC stock has been fully discharged.

NINTH DEFENSE

- 34. Repeats and realleges each and every allegation contained in paragraphs 30, 31 and 32 above as though alleged in full hereat.
- 35. As a part of their settlement, the Levitts and Dynamark exacted from Poloron its promise (a) to file a complaint against Lybrand which would allege that Lybrand had defrauded it into paying the Levitts more than the LMC stock was worth, and (b) to pay over to the Levitts 75% of whatever sums it might obtain from Lybrand.
- 36. As an inducement to Poloron, the Levitts and Dynamark agreed to pay 75% of all costs of the litigation against Lybrand and agreed to reimburse Poloron for 75% of any judgment which Lybrand might obtain by way of counterclaim or third party claim against Poloron or Poloron Indiana. The Levitts and Dynamark also promised to find Poloron an attorney who would prosecute the suit against Lybrand on a contingent fee basis, and promptly caused Poloron to angage their own attorney.
- 37. In return, Poloron agreed that no new attorneys would be retained except with the Levitts' prior approval, and agreed to assign its purported claim on demand if the Levitts wanted to proceed with the litigation themselves.
- 38. By virtue of the above described champertous agreement, plaintiff has been improperly and collusively made to invoke the jurisdiction of this Court, and the complaint must be dismissed.

TENTH DEFENSE

39. Repeats and realleges each and every allegation contained in paragraphs 30 and 31 above as though alleged in full hereat.

- 40. Having dismissed the First Action, on or about
 December 30, 1971 plaintiff filed a complaint against Lybrand in
 the United States District Court for the Northern District of
 Illinois (the "Second Action"). This Second Action was based on
 the same claims involved in the First Action, and the complaint
 was identical to the complaint which commences the present action.
- 41. On or about February 9, 1972 plaintiff voluntarily dismissed the Second Action by filing a notice of dismissal pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.
- 42. Pursuant to Rule 41(a)(1), plaintiff's claim in the present action is barred by the doctrine of res judicata.

ELEVENTH DEFENSE

43. The Levitts, Dynamark and Poloron Indiana are all necessary and indispensable parties to the present action within the meaning of Rule 19 of the Federal Rules of Civil Procedure. Each is subject to the jurisdiction of this Court as to both service of process and venue, and each can be made a party without depriving this Court of jurisdiction over the subject matter of this action, but none has been made a party.

WHEREFORE, Lybrand respectfully demands judgment dismissing the amended complaint with costs and disbursements, including attorneys fees, of this action.

FIRST COUNTERCLAIM

- 44. Lybrand repeats and realleges each and every allegation contained in paragraphs 34, 35, 36, 37, 40 and 41 above as though alleged in full hereat.
- 45. Plaintiff instituted the Second Action maliciously, without probable cause, and solely at the insistence of the Levitts and Dynamark.

- 46. Plaintiff instituted said suit to advance no pecuniary or other justifiable interest of its own, but solely to injure Lybrand.
- 47. On or about September 12, 1972 plaintiff instituted the present suit.
- 48. Plaintiff instituted said suit maliciously, without probable cause, and solely at the insistence of the Levitts and Dynamark.
- 49. Plaintiff instituted said suit to advance no pecuniary or other justifiable interest of its own, but solely to injure Lybrand.
- 50. As a consequence of the wrongful, improper and unlawful acts of plaintiff hereinbefore alleged:
- (a) a substantial amount of the time of executives and other personnel of defendant has been and will be utilized to deal with the problems created by said acts rather than profitably utilized in the operations of defendant, resulting in substantial damages to defendant;
- (b) a substantial amount of money, including counsel fees, was expended by defendant to defend plaintiff's Second Action prior to notification of plaintiff's voluntary nonsuit; and
- (c) a substantial amount of money, including counsel fees, has been and will be expended by defendant to defend the present action.

SECOND COUNTERCLAIM

51. Plaintiff owes Lybrand \$4,830.00 according to the account annexed hereto as Exhibit D, plus interest.

WHEREFORE, Lybrand demands judgment:

(a) Dismissing plaintiff's amended complaint herein;

- (b) As to Lybrand's First Counterclaim, requiring plaintiff to pay Lybrand actual damages in the sum of \$81,500, plus interest, and exemplary damages in the sum of \$1,000,000;
- (c) As to Lybrand's Second Counterclaim, requiring plaintiff to pay Lybrand damages in the sum of \$4,830.00 plus interest;
- (d) Awarding Lybrand the reasonable cost of this 'action, including attorneys fees; and
- (e) Granting such other and further relief as this Court may deem just and proper.

HUGHES HUBBARD & REED

A Hembe

Attorneys for Defendant One Wall Street

New York, New York 10005 (212) WH 3-6500

Dated: New York, New York May 15, 1974

1	<u> </u>			
	Liabilities And Stockholde	rs' Equi	Lu	
	Bank overdrafts Notes payable:			\$ 10532815
-	Bauk Vendors		×100496708	
	Notes payable - Talcott		11	129897453
	Accounts payable Employees' funds withheld			13005648; 89709335 13748535
	Darranty claims payable			13174355 4389328 5700000
,	Total corrent liabilities.			266983114
_	Notes payable Less, Current portion		24000000	!
· · · · · · · · · · · · · · · · · · ·	LOUNS payable, stockholders		6000000	1180749
	Stockholders' equity:			296163863
-	Capital stock, No par value: Authorized 200 shares;			
	Retained earnings (deficit)		10000000	• •
1	lotal stockholders' equity	\	<u> </u>	(31651629)
-	Total liabilities and stockholder	rs' equity	لار : !	2645092.34

EXHIBIT A TO ANSWER AND COUNTERCLASMS .

PREPARED BY	Draft 12/1/67
CHECKED: FOOTINGS BY EXTENSIONS BY	
DEEEDE LACE BY	9 Corporation
Balance Sheet, as at So	eptember 30, 1967
Current Assets: Assets	
CASH	\$ 7,00,97
Trade receivables:	
Accounts .	7106636325
Account receivable-Federal Income Tax Re	98462.19 Fund No42.07
	116886751
Less Allowance for doubt ful Account	1
Inventory at the lower of estimate	
Prepaid expenses	319332
Total current assets	209172578
Equipment, qt cost:	
Office equipment	66 16694
Factory equipment	25/89262
Tooling And dies	47719683
Leasehold improvements	807 680 36
Less, Accumulated depreciation	25581380 55186656
latents and trade name	150000
o Total Assets	264509234

December 1, 1967

Mr. Samuel Levitt Hr. Jay Levitt Mr. Carl Levitt Mr. Jack Whitney 230 Fifth Avenue New York, New York

Dear Sirs:

In connection with the Closing today of our Agreement, dated October 27, 1967 ("Agreement"), with respect to our purchase of all of your outstanding stock in Levitt Manufacturing Corporation ("Levitt"), we have agreed as follows:

1. Lybrand, Ross & Montgomery has this day delivered to us a tentative balance sheet of Levitt as of September 30, 1967, a copy of which has been initialled by us and by Samuel Levitt. The net worth, as shown on such financial statement, subject to any corrections that Lybrand, Ross and Montgowery may make and as finally certified by them, shall be defined to be the net worth of Levitt as of September 30, 1967 for all purposes of the Agreement, except as otherwise stated herein, and subject to the following adjustment: Notwithstanding the figure shown in such statement as the value of the inventory of Levitt, which figure in the tentative balance sheet is \$1,062,563.93, such inventory shall be deemed to be \$50,000 less than the amount shown on such certified statement shall be reduced by like amount.

2. The allowance for doubtful accounts to be shown on

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EXHIBIT B TO ANSWER AND COUNTERCLAIMS

Page Two

December 1, 1967

such certified statement, which amount on the tenuative financial statement is \$150,000, specifically includes the allowances shown on Appendix A for the accounts listed thereon. If by September 30, 1968 the amounts actually collected from any of the accounts listed in Appendix A with respect to their respective outstanding accounts as of September 30, 1967 exceeds the face amount of such accounts as of September 30, 1967, less the applicable allowance shown on Appendix A, we shall, for purposes of the Agreement, increase the net worth of Levitt as of September 30, 1967, by any such amount or amounts. Any amounts so credited shall reduce the aggregate reserve for doubtful accounts shown on such certified statement as of September 30, 1967, and in the event that as of September 30, 1967 the amounts collected on the balance of such receivables (less the accounts listed in Appendix A. exceeds the net amount of such receivables as of September 30, 1967, we shall increase the net worth of the balance sheet as of September 30, 1967 by such excess for purposes of the Agreement.

3. In the event that it appears on September 30, 1968 that the liabilities of Levitt as of September 30, 1967 fail to disclose all the current liabilities owing

EXHIBIT B TO ANSWER AND COUNTERCLAIMS

Page Three

December 1, 1957

to trade creditors as of September 30, 1967, the net worth as of September 30, 1967 shall be decreased by the amount of such undisclosed liabilities.

4. For purposes of determining any adjustment in the receivables, allowance for doubtful accounts, or in the liabilities, it is understood and agreed that any settlement, adjustment or compromise with respect to same shall be determined solely by us, except that we shall not compromise or settle the outstanding amounts due as of September 30, 1957 with respect to the accounts listed in Appendix A without the consent of Samuel Levitt. We shall, however, seek your advice, cooperation and concurrence in connection with any such settlement, adjustment or compromise.

This letter shall be deemed to supplement and amend our Agreement of October 27, 1967 which, except as indicated herein, is in all respects ratified and confirmed.

Very truly yours,

AGREED TO
AND ACCEPTED:

Samuel Levite

Samuel Levite

Construction

Con

EXHIBIT B TO ANSWER AND COUNTERCLAIMS

A XIGHAYYA

Accounts

Aldens

Kilway

John Plain

Grainger

Berkshire

Val Test

Crewcut

Swope Parkway

Kreage

Allowance for Doubtful Accounts \$ 32,500 20,000 8,000 600 Co-Op Electric 500 6,200 3,732 7,493 2,173 2,020 T & R Distributing

2,380

85,593

EXHIGITE G

SALES REPRESENTATIVE'S AGREEMENT

AGREEMENT dated this 1st day of December , 1967, by and between LEVITT MANUFACTURING CORPORATION (hereinafter called "the Company") and SAMUEL LEVITT (hereinafter called "Levitt").

This Sales Representative's Agreement is entered into pursuant to Section 7B of an Agreement dated as of October 77, 1957 (hereinafter called "the Agreement") providing for the purchase by Poloron Products, Inc. (hereinafter called "Poloron") of all the outstanding capital stock of the Company.

The parties hereto agree as follows:

- 1. The Company here'y appoints Levitt as its exclusive sales representative for the period commencing on the Effective Date, as hereinafter defined, and except as provided for in paragraph 6, terminating three (3) years thereafter. Levitt accepts such appointment and agrees during the term hereof to use his best efforts to promote the sale of, to sell and to cause others to sell, the Company's products and to perform such other duties in connection with his activities hereunder as the Company reasonably may request from time to time.

EXHIBIT C TO ANSWER AND COUNTERCLAIMS

exclusive of taxes and shipping charges. Commissions shall be paid with respect to each month's shipments during the term hereof on or before the tenth day of the following month. Any commissions paid with respect to merchandise which is returned to and accepted by the Company shall be charged back to Levitt and deducted from any amounts due him hereunder.

- 3. Levitt shall, in connection with his duties hereunder (1) provide and maintain a sales office in New York City, (2) employ and maintain an adequate sales force to solicit the trade and provide the desired market exposure for the Company's products, (3) secure representation of the Company's products at trade shows, including the display and exhibition of such products at the annual Hardware Show generally held in October of each year and at the two National Houseware Shows generally held in January and July of each year, and (4) provide such other facilities and services as may be required of Levite as the Company exclusive sales representative in the sale and marketing of the Company's products. Levitt shall bear all costs and expenses incurred in connection with his activities hereunder, except that the Company shall reimourse him for advertising expenses incurred by him in an amount not to exceed \$25,000 for each fiscal year. All persons employed by Levitt shall be his employees and not employees of the Company or of Poloron. Levitt shall act hereunder as an independent contractor and not as an agent or employee of Poloron or the Company and he shall have no authority to coligate the Company or Poloron in any manner.
 - 4. All sales for or on behalf of the Company shall be subject to acceptance by the Company which shall have the absolute

EXHIBIT C TO ANSWER AND COUNTERCLAIMS

right in its discretion to refuse to accept any orders, whether produced by Levitt or others, to refuse to make any shipment and to accept such returns with respect to any such shipments as it may determine, provided, however, that if the Company refuses to accept any orders produced by Levitt and does not, within twenty (20) days after such orders are forwarded to it for acceptance, advise Levitt of the reasons for such refusal, such orders shall be treated as if they were shipped in full for purposes only of paragraph 6 herein.

- 5. Levitt agrees to indemnify and hold the Company am Poloron harmless against any damage, loss, liability, cost or expense in any way relating to Levitt's business or his services and activities hereunder or in connection herewith.
- 6. In the event that the aggregate invoice value of shipments made by the Company to customers in any twelve month period ending on June 30 do not exceed \$5,000,000, the Company may, at any time thereafter, upon thirty (30) days written notice to Levitt, terminate this Sales Representative's Agreement
- 7. This Agreement may not be assigned by Levitt without the Company's written consent, except that Levitt may assign this Agreement to a corporation of which at least 50% of the outstanding stock is owned by him.
- 8. This Sales Representative's Agreement shall become effective on the date that Poloron acquires all the outstanding stock of the Company pursuant to the Agreement, such date being referred to herein as the "Effective Date".

EXHIBIT C TO ANSWER AND COUNTERCLAIMS

- 9. Levitt agrees that during the term of this agreement or any renewal hereof he will not directly or indirectly sell, handle, deal in or represent others in the sale of, products which compete with the products manufactured or sold by the Company, provided, however, that in the event the Company proposes to manufacture or sell a new product or item not theretofore manufactured or sold by it, it will so advise Levitt who shall thereupon have 90 days within which to cease any activities theretofore conducted by him with respect to any competing item or product.
- 10. This agreement shall be renewable for successive one year terms on the same terms and conditions herein contained unless prior to the 1st of June preceding immediately the expiration of the original term of this agreement or any renewal term either party advises the other party in writing of his or its intention not to so renew.
- 11. This Sales Representative's Agreement may not be changed or terminated orally and shall be construed and interpreted in accordance with the laws of the State of New York.
- 12. The Company will be entitled to setoff and deduct from amounts payable to Levitt or its assignee hereunder any amounts due or payable by Levitt to the Company or to Poloron under the Agreement or otherwise.

IN WITNESS WHEREOF, the parties here to have caused this Agreement to be executed as of the day and year first above written.

LEVITT MANUFACTURING CORPORATION

By Milisten Joh.

Samuel Levity

EXHIBIT D TO ANSWER AND COUNTERCLAIMS

January 29, 1969

Mr. Menchen Jacobi
Poloron Products of Indiana, Inc.
133 Hugen t Street
Thomas, New York

Professional services through December 31, 1968, including a review of report of examination for the year ended September 30, 1957.

Conferences.

Expenses

\$ 4,400.00

\$ 4,830.00

THIRD PARTY COMPLAINT.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff,

-against-

72 Civ. 3884

LYBRAND, ROSS BROS. & MONTGOMERY (now known : as Coopers & Lybrand),

THIRD PARTY COMPLAINT

Defendant and Third-Party Plaintiff,

-against-

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION AND GEORGE FEIWELL,

Third Party Defendants.

Defendant and third-party plaintiff Lybrand, Ross Bros. & Montgomery ("Lybrand"), by its attorneys Hughes Hubbard & Reed, alleges:

- 1. Plaintiff Poloron Products, Inc. ("Poloron") has filed against Lybrand a complaint (the "Complaint"), a copy of which is hereto attached as Exhibit A, and an amended complaint (the "Amended Complaint"), a copy of which is attached as Exhibit B.
- 2. This third-party action arises under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and the Rules and Regulations of the Securities and Exchange Commission promulgated thereunder, and under principles of common law.
- 3. Jurisdiction of this Court is ancillary to its jurisdiction over the principal action, and is further based upon Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa).

THIRD PARTY COMPLAINT

- 4. Lybrand is a partnership of certified public accountants organized under the laws of the State of New York and maintains offices at, among other places, 1251 Avenue of the Americas, New York, New York within the Southern District of New York.
- 5. Third-party defendant Poloron Products of Indiana, Inc. is a New York corporation having its principal place of business in the State of Indiana, and is the successor in interest to and was formerly known as Levitt Manufacturing Corporation (hereinafter both Levitt Manufacturing Corporation and Poloron Products of Indiana, Inc. are referred to as "Poloron Indiana").
- , 6. At all times pertinent hereto, up to and including December 1, 1967, third-party defendant Samuel Levitt was the principal stockholder and president of Poloron Indiana.
- 7. At all times pertinent hereto, up to and including December 1, 1967, third-party defendant Carl Levitt was a major stockholder and secretary-treasurer of Poloron Indiana, in charge of 'ts financial and bookkeeping operations.
- 8. At all times pertinent hereto, up to and including December 1, 1967, third-party defendant Jay Levitt was a major stockholder and vice president of Poloron Indiana.
- 9. Third-party defendant Dynamark Corporation is an Illinois corporation which, upon information and belief, is wholly owned by the Levitts.
- attorney who, at all times pertinent hereto, (i) up to and including December 1, 1967 was general counsel to and acted as agent for Poloron Indiana; (ii) up to and including the present, has represented and acted as agent for third-party defendants Samuel, Carl and Jay Levitt and Dynamark Corporation, (iii) since June, 1971 has represented and acted as agent for plaintiff with respect to the assertion of claims against Lybrand.

THIRD PARTY COMPLAINT

- 11. On or about October 27, 1967 Poloron entered into a written agreement with Poloron Indiana and Samuel Levitt, Carl Levitt and Jay Levitt (the "Levitts") and one Jack Whitney, the owners of all of the outstanding stock of Poloron Indiana, by the terms of which Poloron agreed to acquire all of said stock in exchange for \$11,200 plus a future amount of Poloron stock equal in value to 20% of the pre-tax earnings of Poloron Indiana for the fiscal years ending in 1968, 1969 and 1970. (A copy of this agreement [the "Turchase Agreement"] is annexed to the Amended Complaint as Exhibit 1.) The Purchase Agreement further provided that the Levitts would produce a balance sheet of Poloron Indiana as of September 30, 1967, audited by Lybrand. The Levitts agreed in paragraph 10A of the Furchase Agreement to indumnify Poloron with respect to any liabilities and claims against Poloron Indiana existing on September 30, 1967 which were not reflected or reserved against in the balance sheet. Paragraph 10B of the Purchase Agreement authorized Poloron to set off any sur it might be owed under the above indemnity provision against the amount of Poloron stock otherwise due sellers.
- and as a condition precedent to Poloron's obligations under the Purchase Agreement, entered into a sales representative agreement (the "Sales Representative Agreement") with Poloron Indiana, a copy of which is attached hereto as Exhibit C. The Sales Representative Agreement icorporated a similar right to set off any amounts owing Poloron under the indemnity provision of the Purchase Agreement against sales commissions otherwise payable to Samuel Levitt or his assignee.
- 13. Lybrand's only role was to report on the September 30, 1967 balance sheet of Poloron Indiana. A handwritten draft of a tentative balance sheet of Poloron Indiana as of September

THIRD PARTY COMPLAINT

30, 1967 (the "Tentative Balance Sheet") was available on December 1, 1967, the Closing Date for the Purchase Agreement. A copy of the Tentative Balance Sheet is annexed hereto as Exhibit D. Lybrand, however, did not render any report until February 9, 1968. A copy of Lybrand's report (the "Report") is attached to the Amended Complaint as Exhibit 3.

FIRST CLAIM FOR RELIEF

- 14. It is alleged in the Amended Complaint (paragraph 15) that Poloron's auditors for the fiscal years ended September 30, 1968 and September 30, 1969 reported the discovery of approximately \$182,000 of liabilities of Poloron Indiana undisclosed in the Tentative Balance Sheet, and that said auditors have discovered other overstatements of accounts receivable and understatements of accounts payable as of September 30, 1967 aggregating approximately \$40,000. Based on these allegations, Poloron claims approximately \$222,000 in its action against Lybrand.
- 15. It is alleged in the Amended Complaint (paragraph 13) that on December 1, 1967, Poloron, in explicit reliance on the balance sheet which was available on that date, consummated the Purchase Agreement.
- 16. It is further alleged in the Amended Complaint (paragraph 14) that the balance sheet at closing overstated the net worth of Poloron Indiana by at least \$222,000, was false and misleading, made untrue statements of material fact and omitted to state material facts, and operated as a fraud and deceit against Poloron.
- 17. In conducting its audit and issuing its report referred to in paragraph 10 herein, Lybrand was not aware of any fraud or deceit as alleged in the Amended Complaint, and, in accordance with generally accepted accounting principles, relied

in good faith upon financial and transactional information and documentation which was provided to it by third-party defendants Poloron Indiana and the Levitts. Lybrand was not aware of any untrue statement of material fact, or of any omission to state a material fact, or of any failures to disclose regarding Poloron Indiana's financial position.

- 18. Upon information and belief, Poloron Indiana and the Levitts had knowledge or reasonable ground to know of any facts which rendered the Tentative Balance Sheet or the Report misleading, or of omissions to disclose or state material facts, which misled Poloron. As parties or participants therein, said third-party defendants knew or should have known of any fraud or deceit as alleged in the Amended Complaint. If such fraud or deceit existed, said third-party defendants participated in the acts and transactions which were allegedly wrongful, and in the acts done in furtherance of the alleged fraud, as alleged in the Amended Complaint and in part in subsequent paragraphs herein.
- 19. If it should be determined, as alleged in the Amended Complaint, that Poloron's consummation of the Purchase Agreement on December 1, 1967 was the result of its reliance on the balance sheet which was available on that date, such reliance was induced by, and was solely the result of a misrepresentation by the Levitts and Poloron Indiana that said balance sheet was reliable.
- 20. If the fraud or deceit as alleged existed, or if the alleged wrongful acts or omissions occurred, such fraud, deceit, acts or omissions were of benefit to, and were designed to be of benefit to, said third-party defendants, and were not

of benefit to or intended to be of benefit to defendant and third-party plaintiff Lybrand.

- 21. In its audit of Poloron Indiana's financial statements, Lybrand relied upon third-party defendants Poloron Indiana
 and the Levitts to disclose the names of all of Poloron Indiana's debtors and creditors, including but not limited to
 customers, suppliers and banks with which it transacted business,
 and Lybrand relied upon representations by said third-party
 defendants that such full disclosure had been made.
- 22. On or about February 9, 1968, third-party defendant Carl Levitt, at Lybrand's request, executed a liability certificate on behalf of Poloron Indiana which certified to Lybrand that Poloron Indiana had no liabilities other than those contained in the Tentative Balance Sheet. A copy of said liability certificate is annexed hereto as Exhibit E.
- 23. Said liability certificate was received by Lybrand on February 9, 1968, and in reliance thereon, Lybrand issued the Report.
- 24. Said liability certificate, <u>inter alia</u>, certified that as of September 30, 1967: (1) all liabilities had been taken up on the books of account, (2) there were no unused balances of letters of credit outstanding and that (3) there were no contingent liabilities except as reported by Poloron Indiana's counsel.
- 25. Upon information and belief, the undisclosed liabilities alleged in the Amended Complaint include, inter alia, a \$45,000 letter of credit entered into for Poloron Indiana with a bank whose name was not disclosed to Lybrand and with which Poloron Indiana did not otherwise deal.
- 26. If it should be determined, as alleged in the Amended Complaint, that liabilities, doubtful receivables, costs

and losses in fact existed as of September 30, 1970 but were concealed and not disclosed, third-party defendants Poloron Indiana, Samuel Levitt, Carl Levitt and Jay Levitt are responsible therefor.

- 27. Third-party defendant Dynamark Corporation, as assignee of Samuel Levitt's rights under the Sales Representative Agreement, has received \$1,500,000 from Poloron Indiana since the consummation of the Purchase Agreement. To the extent that the allegations contained in paragraph 14 of the Amended Complaint are true, Dynamark Corporation and its only stockholders, the Levitts, have been unjustly enriched.
- or any opinions rendered thereon by Lybrand, should be determined to have been misleading, or if any statements made by Lybrand received by plaintiff should be determined by the court to have contained an untrue statement of a material fact, or to have omitted to state a material fact necessary in order to make any statement made, in the light of the circumstances under which it was made, not misleading, then and in that event third-party defendants Poloron Indiana, Samuel Levitt, Carl Levitt, Jay Levitt and Dynamark, and each of them, are liable over to Lybrand for all or part of any judgment rendered against Lybrand, and for the costs and expenses to Lybrand resulting from this litigation.
- 29. As set forth hereinbefore, said third-party defendants are or may be liable to defendant and third-party plaintiff Lybrand for all or part of plaintiff's claim against Lybrand.

SECOND CLAIM FOR RELIEF

30. Upon information and belief, at some time not later than the Fall of 1967, while the Levitts were negotiating

the sale to Poloron of their stock in Poloron Indiana, the Levitts devised a scheme and conspiracy to deceive and defraud Lybrand in the performance of its audit of the balance sheet of Poloron Indiana as of September 30, 1967 and to deceive and defraud Poloron.

- 31. Upon information and belief, in pursuit of their scheme and conspiracy the Levitts withheld from Lybrand vital information with respect to the liabilities and assets of Poloron Indiana, including, inter alia, all references to certain creditors of Poloron Indiana, including but not limited to suppliers and banks, with the full knowledge and expectation that Lybrand was relying and would rely upon the financial and transactional information and documentation which was provided to it, and Lybrand did so rely.
- 32. As a direct result of the Levitts' scheme and conspiracy, the Tentative Balance Sheet described in paragraph 12 above, upon information and belief, understated the liabilities and overstated the assets and balance sheet net worth of Poloron Indiana. Upon information and belief, said undisclosed liabilities included, inter alia, a \$45,000 letter of credit entered into for Poloron Indiana by the Levitts with a bank whose name the Levitts withheld from Lybrand and with which Poloron Indiana did not otherwise deal.
 - 33. Further in pursuit of their conspiracy and scheme,
 - (a) Upon information and belief, at the closing of the Purchase Agreement on December 1, 1967, the Levitts misrepresented to Poloron that the Tentative Balance Sheet then in Poloron's possession accurately stated the liabilities and assets of Poloron Indiana,

the by Liducing Poloron to consummate the Purchase Agreement; and

- (b) on or about February 9, 1968, third party defendant Carl Levitt executed a liability certificate (annexed hereto as Exhibit E) which certified to Lybrand that Poloron Indiana had no liabilities other than those contained in the Tentative Balance Sheet. Said liability certificate was received by Lybrand on February 9, 1968, and in reliance thereon Lybrand issued the Report.
- , 34. The actions of the Levitts and Poloron Indiana set forth above were intended to and did result in, upon information and belief, a false record of the assets and liabilities of Poloron Indiana upon which Poloron relied in consummating the Purchase Agreement on December 1, 1967, and which Lybrand was induced to partially certify on February 9, 1968.
- 25. Upon information and belief, the Levitts' conspiracy to defraud and deceive Lybrand, which resulted in the false record described above, was an essential part of a larger scheme pursuant to which (a) they hoped to avoid at least part of the impact upon them of Poloron's set-off rights described in paragraph 10 and 11 above, and (b) they planned to use said false record of assets and liabilities as a basis for making money demands against Lybrand.
- 36. In 1968, 1969 and 1970 Poloron discovered what it believed to be liabilities, overstatements of accounts receivable and understatements of accounts payable as of September 30, 1967 which reduced the balance sheet net worth of Poloron Indiana by several hundred thousand dollars. Poloron accordingly exercised its set-off rights against the Levitts and Dynamark.

- 37. In 1970 the Levitts and Dynamark, represented by third party defendant Feiwell, commenced an action against Poloron Indiana in the Northern District of Indiana, seeking to recover the amounts which had been set off.
- 38. Upon information and belief, third party defendant Peiwell then knew of the scheme and conspiracy of his clients hereinabove set forth, and, in accordance with said scheme and as a co-conspirator therein, shortly before trial filed an amended complaint which added Lybrand as a defendant.
- 39. Before Lybrand had responded, the action was transferred to this Court pursuant to 28 U.S.C.A. § 1404(a) and the complaint was again amended, adding Poloron as a defendant.
- 40. In the claim against Lybrand, it was falsely alleged that at closing on December 1, 1967 Lybrand had delivered a balance sheet of Polyron Indiana which had been certified by Lybrand; that the Levitts had relied on this balance sheet of their own company in closing; that the certified balance sheet was part of a scheme by Lybrand to defraud; and that it had operated as a fraud and deceit upon them. The complaint demanded that Lybrand pay the Levitts and Dynamark all amounts which Poloron and Poloron Indiana were permitted to set-off.
- defendant Samuel Levitt and Joseph D. Brown, then President of Poloron, entered into secret settlement discussions. In accordance with their scheme, the Levitts and Dynamark undertook to persuade Brown that the nondisclosure of Poloron Indiana's liabilities had been Lybrand's fault and that Poloron had a legal claim against Lybrand for fraud. Upon information and belief, the Levitts and Dynamark further persuaded Mr. Brown that the balance sheet present at the closing 4 years earlier had been, not the Tentative Balance Sheet, but the partially certified one which in fact had been issued two onths after closing.

- 42. In the course of the settlement discussions the Levitts and Dynamark exacted from Poloron its promise (a) that after the pending action had been dismissed, it would file a new suit against Lybrand which would allege that Lybrand had defrauded it into paying the Levitts more than the Poloron Indiana stock was worth, and (b) that it would pay over to the Levitts 75% of whatever sums it might obtain from Lybrand.
- mark agreed to pay 75% of all costs of the litigation against Lybrand and agreed to reimburse Poloron for 75% of any judgment which Lybrand might obtain by way of counterclaim or third party claim against Poloron or Poloron Indiana. The Levitts and Dynamark further promised to find Poloron an attorney who would prosecute the suit against lybrand on a contingent fee basis, and promptly caused Poloron to so engage third party defendant Feiwell. In return, Poloron agreed that no new attorneys would be retained except with the Levitts' prior approval, and agreed to assign its purported claim on demand if the Levitts wanted to proceed with the litigation themselves.
- Poloron reduced their agreement to writing, and on June 28, 1971, Lybrand's counsel was told that a settlement had been concluded and that the parties wished to terminate the litigation. Lybrand, knowing nothing of the terms of settlement, entered into a stipulation of dismissal pursuant to Rule 41(a)(1).
- 45. In further pursuit of the scheme and constiracy, on or about December 30, 1971 Feiwell instituted the promised suit on behalf of Poloron against Lybrand in the United States District Court for the Northern District of Illinois. The complaint therein falsely alleged that at the closing of the Purchase Agreement

Lybrand had delivered a certified balance sheet of Poloron Indiana that Poloron had explicitly relied on the certified balance sheet when it closed the Purchase Agreement on December 1, 1957, that the certified balance sheet was part of a scheme to defraud, and that it had operated as a fraud and deceit upon Poloron.

- 46. Lybrand engaged counsel in the Northern District of Illinois and otherwise prepared to defend the action, but on or about February 9, 1972 Feiwell dismissed the complaint by filing a notice of dismissal pursuant to Rule 41(a)(1).
- 47. In September, 1972, again as part of the scheme of the Levitts and Dynamark, third-party defendant Feiwell instituted the present suit on behalf of Poloron against Lybrand. The Complaint again made the false allegations described in paragraph 45 above.
- 48. As a result of a motion made by Lybrand for sanctions under Rule 11, the Amended Complaint was filed. Therein, it is no longer alleged that Poloron received a certified balance sheet at closing. Instead, it is now alleged that the Tentative Balance Sheet was received at closing, but that Lybrand made representations as to its accuracy. Apart from this change, the allegations remain essentially unchanged.
- 49. By virtue of the malicious and willful acts of the Levitts, Dynamark and Feiwell hereinabove set forth, and as a direct consequence thereof, Lybrand has been wrongfully forced to defend against three baseless lawsuits in succession, involving five separate complaints, resulting in damage to it as follows:
 - (a) Substantial time of executives and other personnel of Lybrand has been and will be lost, rather than profitably utilized in the operations of Lybrand; and

(b) Substantial attorneys' fees and other expenses have been and will be incurred.

WHEREFORE, defendant and third-party plaintiff Lybrand demands:

- A. As to its First Claim For Relief, in the event that judgment is hereafter rendered in favor of plaintiff against Lybrand, judgment over against third party defendants Poloron Indiana, the Levitts and Dynamark in the amount of the said judgment, or part thereof;
- B. As to its Second Claim For Relief, judgment against the third party defendants, and each of them, for actual damages in the sum of \$93,000, plus interest, plus exemplary damages in the sum of \$1,000,000;
- C. Its costs and disbursements, including counsel fees, of this action; and
- D. Such other and further relief as this Court may deem just and proper.

HUGHES HUBBARD & REED

By A Henber bil the Firm

Attorneys for Defendant and Third-Party Plaintiff One Wall Street New York, New York 10005 WH 3-6500

Dated: New York, New York May 15, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF HEW YORK

PCLORON PRODUCTS, INC., a New York 72 (W. 3884: corporation,

Plaintiff,

-against-

LYBRAND, ROSS BROS. & MONTGCHERY,

Defendant.

COMPLAINT AND JURY DEMAND

Plaintiff Poloron Products, Inc., by its attorneys, Gold, Farrell & Marks, for its complaint herein, allege as follows:

THE PARTIES

- 1. Plaintiff Poloron Products, Inc., (hereinafter referred to as "Poloron New York") is a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York.
- 2. Defendant Lybrand, Ross Bros. & Montgomery (hereinafter referred to as "Lybrand") is a general partnership of certified public accountants, organized under the laws of the State of New York, doing business in many cities throughout the United States, including the City of New York, State of New York. Defendant Lybrand represents itself as a firm of expert accountants and auditors.

JURISDICTION

3. The claim set forth herein arises under the

Securities Exchange Act of 1934, Section 10(h), 15 U.S.C. §78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. §240.10b-5, promulgated thereunder. Venue is based on Section 27 of said Act, 15 U.S.C. §78aa.

THE PURCHASE AGREEMENT

- 4. On October 27, 1967, plaintiff entered into a written agreement with Levitt Manufacturing Corporation and Samuel Levitt, Carl Levitt, Jay Levitt, and Jack Whitney, the owners of all of the outstanding stock of the Levitt Manufacturing Corporation (these four persons are hereinafter collectively referred to as the "Sellers"), by the terms of which plaintiff acquired all of said stock in exchange for (a) \$11,200.00, and (b) an amount of stock in plaintiff equal in value to 20% of the pre-tax earnings of the Levitt Manufacturing Corporation for the fiscal years ended in 1968, 1969 and 1970, as provided therein. A copy of this Agreement (hereinafter referred to as the "Purchase Agreement") is annexed hereto as Exhibit 1.
- 5. On October 27, 1967, plaintiff had possession of unaudited Balance Sheets of the Levitt Manufacturing Corporation as at March 31, 1967; April 30, 1967; May 31, 1967; June 30, 1967; July 31, 1967 and August 31, 1967. The only audited Balance Sheet of the Levitt Manufacturing Corporation in the possession of plaintiff was one prepared by defendant Lybrand as at September 30, 1966. Similarly, on October 27, 1967, plaintiff had possession of the unaudited Income Statements of Levitt Manufacturing Corporation monthly and cumulatively from October 1, 1966 to and for the months including March 31, April 30, May 31, June 30 and July 31, 1967, respectively. In addition plaintiff

possessed an unaudited Income Statement of the Levitt Manufacturing Corporation for the eleven months ended August 3, 1967.

The only audited Income Statement of Levitt Manufacturing Corporation possessed by plaintiff was that for the twelve months ended September 30, 1956.

- 6. In paragraph 1E of the Purchase Agreement, the Sellers represented that the financial statements described in the preceding paragraph above were correct, complete and fairly presented the financial condition of the Levitt Manufacturing Corporation as at the aforesaid respective dates, and the results of operations of Levint Manufacturing Corporation for such periods, respectively, in conformity with consistently applied, generally accepted accounting principles. The Sellers further represented that, since August 31, 1967, there had been no material adverse change in the financial condition of the Levitt Manufacturing Corporation, other than changes occurring in the ordinary course of business, except that Levitt Manufacturing Corporation would incur a loss from the period from August 31, 1967 to the Closing Date (December 1, 1967) in an amount not exceeding \$200,000.
- 7. As set forth in paragraph 15 of the Purchase Agreement annexed hereto, the Sellers also represented to the plaintiff that defendant Lybrand would prepare and certify a Balance Sheet of Levitt Manufacturing Corporation as at September 30, 1967, rursuant to an audit which defendant Lybrand was then conducting, and that the net worth of Levitt Manufacturing Corporation, which would be shown on said Balance Sheet "will not be less than the net worth shown on the August 31, 1967 Balance Sheet of Levitt Manufacturing Corporation, referred to

in Section 1E hereof, less \$200,000."

8. The aforesaid Purchase Agreement provided in paragraph 7 hereof that the plaintiff would, in its discretion, not be obligated to consummate the purchase transaction contemplated therein, unless, on or before the Closing Date:

"Buyer shall not have discovered any ma erial error, misstatement or omission in the representations and warranties made by the Sellers and all the terms, covenants and conditions of this Agreement to be complied with and performed by Sellers or the Company, on or before the Closing Date, shall have been complied with and performed, provided, however, that anything herein to the contrary notwithstanding and without affecting the efficacy or the validity of the warranties and representations made herein, Buyer agrees that it will not refuse to close on the grounds that this Section 7A has not been satisfied, if the effect of any breaches, misstatements and misrepresentations by Sellers herein is to reduce the Company net worth as of September 30, 1967 by not more than \$400,000 from the net worth as shown on the Company's balance sheet as of August 31, 1967 referred to in Section 1E herein. Whether or not the balance sheet as of September 30, 1967, as prepared by the accountants shall reflect a liability for income taxes due with respect to the year ended September 30, 1966, if the loss suffered during the year ended September 30, 1967 shall result in a carry back credit of at least that amount, then unless such carry back shall be reflected as an asset on such balance sheet, such liability shall be eliminated in determining the net worth of the Company as of September 30, 1967 for all the purposes of this Agreement."

CAUSE OF ACTION

9. Commencing several weeks prior to October 27, 1957 and at all relevant times herein defendant Lybrand knew of plaintiff's negotiations with the Sellers leading to the Purchase Agreement and of the execution thereof; were informed of the planned Closing Date; and were rully aware that plaintiff would not consummate the purchase of Levitt Manufacturing Corporation

until it obtained possession of the defendant Lybrand's certified Balance Sheet of Levitt Manufacturing Corporation as at September 30, 1967. Lybrand was informed, and was aware that plaintiff possesse he option not to consummate said purchase set forth in paragraph 7A of the Purchase Agreement.

- pared and did not possess a Balance Sheet as at September 30, 1967, which it would tender to defendant Lybrand for audit.

 Defendant Lybrand prepared from the financial records, books and ledgers of Levitt Manufacturing Corporation its Balance

 Sheet as at September 30, 1967, and it was this Balance Sheet which defendant Lybrand examed and audited, and ultimately certified, subject to the one qualification set forth and described below. Defendant Lybrand's certificate attached to the audited Balance Sheet was dated November 20, 1967; but said Balance Sheet and certificate were presented to plaintiff at a time subsequent thereto and only shortly before the Closing Date. The audited Balance Sheet of Levitt Manufacturing Corporation as at September 30, 1967, with the certificate of defendant Lybrand attached is annexed hereto as Exhibit 2.
- ll. The language of the aforesaid certificate of defendant Lybrand renders said certificate under the governing principles and rules and custom and usage of the accounting profession a "piecemeal" certificate. Defendand Lybrand stated that, because it was unable to satisfy itself as to the pricing of the physical inventory at the Balance Sheet date (although it was satisfied as to quantities), it was: "not able to express an opinion on the inventory or on related accounts that are affected by inventory such as cost of sales, income tax liability

and expense, net income and retained earnings." Defendant Lybrand then stated that:

"Because of the materiality of those matters, we express no opinion on the accompanying balance sheet taken as a whole.

"However, in our opinion, the assets, liabilities and capital included in the accompanying
balance sheet, other than inventory and the
related accounts referred to above, are fairly
presented in conformity with generally accepted
accounting principles applied on a basis consistent with that of the preceding year."

For the same reason, its inability to satisfy itself on the pricing of the ending inventory, defendant Lybrand expressed no opinion whatsoever on the Statement of Income for the fiscal year ended September 30, 1967, which Statement of Income was appended to the aforesaid Balance Sheet and is a part of Exhibit 2 annexed hereta.

- 12. Shortly after receiving possession of said audited Balance Sheet, and in explicit reliance thereon, plaintiff, on or about December 1, 1967, consummated the Purchase Agreement.
- in connection with the sale of the stock in Levitt Manufacturing Corporation and the certified Balance Sheet prepared and submittal by Lybrand on which plaintiff relied, (a) were false and misheading, (b) constituted part of a scheme to defraud, (c) were untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misheading, and (d) operated as a fraud and deceit upon the plaintiff, in that, in truth and in fact, they understated the liabilities and overstated the assets and Balance Sheet net worth of Levitt Manufacturing Corporation as of September 30, 1967, by at least \$222,000.

- ration, subsequently renamed "Poloron Products of Indiana, Inc.,"

 (hereinafter referred to as "Poloron Indiana"), by plaintiff's
 auditors for the fiscal years ended September 30, 1968 and
 September 30, 1969, said auditors reported the discovery of
 \$122,687.00 and \$59,095.00, respectively, in liabilities of
 Levitt Manufacturing Corporation existing as of September 30,
 1967, and undisclosed by Lybrand in the Balance Sheet prepared
 and certified by Lybrand as of that date. Plaintiff's auditors
 have discovered additional overstatements of accounts receivable
 and under statements of accounts payable aggregating approximately
 \$40,000.00. The foregoing undisclosed liabilities and overstated
 assets produce a total of approximately \$22,000.00 by which the
 net worth of Levitt Manufacturing Corporation as at December 30,
 1967 was overstated.
- 15. In connection with the purchase by plaintiff of all of the stock of Levitt Manufacturing Corporation and in connection with the preparation and presentation of the aforesaid audit of the financial condition of Levitt Manufacturing Corporation, the United States mails and other means of communication and instrumentalities of interstate commerce were used.
- 16. The aforesaid conduct of defendant Lybrand constituted a violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) and Rule 10b-5 thereunder.

WHEREFORE, plaintiff prays that this Court enter judgment on its behalf against defendant Lybrand, Ross Bros. &

· EXHIBIT A TO THIRD PARTY COMPLAINT Montgomery in the amount of \$222,000, plus interest thereon and plaintiff's costs and disbursements of this action. Plaintiff demands a jury for the trial of this cause.

Dated: New York, New York September 11, 1972

GOZD, FARRELL & MARKS

A Member of the Firm Attorneys for Plaintiff 595 Madison Avenue New York, New York 10022 (212) 935-9200

FEIWELL, GALPER & GORDON 33 North LaSalle Street Chicago, Illinois 60602 (312) 782-4844

1981.71 Record

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC., a New York corporation,

72 Civ. 3884

Plaintiff,

-against-

LYBRAND, ROSS BROS. & MONTGOMERY,

AMENDED COMPLAINT JURY DEMANDED

Defendant.

Plaintiff Poloron Products, Inc., by its attorneys, Gold, Farrell & Marks, for its amended complaint herein, alleges as follows:

THE PARTIES

- I. Plaintiff Poloron Products, Inc., (hereinafter referred to as "Poloron New York") is a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York.
- 2. Defendant Lybrand, Ross Bros. & Montgomery
 (hereinafter referred to as "Lybrand") is a general partner—
 ship of certified public accountants, organized under the
 laws of the State of New York, doing business in many cities
 throughout the United States, including the City of New York,
 State of New York. Defendant Lybrand represents itself as a
 firm of expert accountants and auditors.

JURISDICTION

3. The claim set forth herein arises under the Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. §78j(b), and Rule 10b-5 of the Securities and Exchange

Commission, 17 C.F.R. §240.10b-5, promulgated thereunder. Venue is based on Section 27 of said Act, 15 U.S.C. §78aa.

THE PURCHASE AGREEMENT

- 4. On October 27, 1967, plaintiff entered into a written agreement with Levitt Manufacturing Corporation and Samuel Levitt, Carl Levitt, Jay Levitt, and Jack Whitney, the owners of all of the outstanding stock of the Levitt Manufacturing Corporation (these four persons are hereinafter collectively referred to as the "Sellers"), by the terms of which plaintiff acquired all of said stock in exchange for (a) \$11,200.00, and (b) an amount of stock in plaintiff equal in value to 20% of the pre-tax earnings of the Levitt Manufacturing Corporation for the fiscal years ended in 1968, 1969 and 1970, as provided therein. A copy of this Agreement (hereinafter referred to as the "Purchase Agreement") is annexed hereto as Exhibit 1.
- 5. On October 27, 1967, plaintiff had possession of unaudited Balance Sheets of the Levitt Manufacturing Corporation as at March 31, 1967; April 30, 1967; May 31, 1967; June 30, 1967; July 31, 1967 and August 31, 1967. The only audited Balance Sheet of the Levitt Manufacturing Corporation in the possession of plaintiff was one prepared by defendant Lybrand as at September 30, 1966. Similarly, on October 27, 1967, plaintiff had ressession of the unaudited Income Statements of Levitt Manufacturing Corporation monthly and cumulative from October 1, 1966 to and including March 31, April 30, May 31, June 30 and July 31, 1967 respectively. In addition, plaintiff possessed an unaudited Income Statement of Levitt Manufacturing Corporation for the twelve months ended September 30, 1966.

- 6. In paragraph 1E of the Purchase Agreement, the Sellers represented that the financial statements described in the preceding paragraph above were correct, complete and fairly presented the financial condition of the Levitt Manufacturing Corporation as at the aforesaid respective dates, and the results of operations of Levitt Manufacturing Corporation for such periods, respectively, in conformity with consistently applied, generally accepted accounting principles. The Sellers further represented that, since August 31, 1967, there had been no material adverse change in the financial condition of the Levitt Manufacturing Corporation, other than changes occurring in the ordinary course of business, except that Levitt Manufacturing Corporation would incur a loss from the period from August 31, 1967 to the Closing Date (December 1, 1967) in an amount not exceeding \$200,000.
 - 7. As set forth in paragraph 15 of the Purchase Agreement annexed hereto, the Sellers also represented to the plaintiff that defendant Lybrand would prepare and certify a Balance Sheet of Levitt Manufacturing Corporation as at September 30, 1967, pursuant to an audit which defendant Lybrand was then conducting, and that the net worth of Levitt Manufacturing Corporation, which would be shown on said Balance Sheet "will not be less than the net worth shown on the August 31, 1967 Balance Sheet of Levitt Manufacturing Corporation, referred to in Section 1E hereof, less \$200,000."
- 8. The aforesaid Purchase Agreement provided in paragraph 7 hereof that the plaintiff would, in its discretion, not be obligated to consummate the purchase transaction contemplated therein, unless, on or before the Closing Date:

"Buyer shall not have discovered any material error, misstatement or omission in the representations and warranties made by the Sellers and all the terms, covenants and conditions of this Agreement to be complied with and performed by Sellers or the Company, on or before the Closing Date, shall have been complied with and performed, provided, however, that anything herein to the contrary notwithstanding and without affecting the efficacy or the validity of the warranties and representations made herein, Buyer agrees that it will not refuse to close on the grounds that this Section 7A has not been satisfied, if the effect of any breaches, misstatements and misrepresentations by Sellers herein is to reduce the Company's net worth as of September 30, 1967 by not more than \$400,000 from the net worth as shown on the Company's balance sheet as of August 31,1967 referred to in Section 1E herein. Whether or not the balance sheet as of September 30, 1967, as prepared by the accountants shall reflect a liability for income taxes due with respect to the year ended September 30, 1966 if the loss suffered during the year ended September 30, 1967 shall result in a carry back credit of at least that amount, then unless such carry back shall be reflected as an asset on such balance sheet, such liability shall be eliminated in determining the net worth of the Company as of September 30, 1967 for all the purposes of this Agreement."

CAUSE OF ACTION

- and at all relevant times herein defendant Lybrand knew of plaintiff's negotiations with the Sellers leading to the rurchase Agreement and of the execution thereof; were informed of the planned Closing Date; and were fully sware that plaintiff would not consummate the purchase of Levitt Manufacturing Corporation until it obtained possession of the defendant. Lybrand's certified Balance Sheet of Levitt Manufacturing Corporation as at September 30, 1967. Lybrand was informed, and was aware that plain if possessed the option not to consummate said purchase set forth in paragraph 7A of the Purchase Agreement.
- . 10. Levitt Manufacturing Corporation had not prepared and did not possess a Balance Sheet as at September 30, 1967,

which it could tender to defendant Lybrand for audit.

Defendant Lybrand prepared from the financial records,

books and ledgers of Levitt Manufacturing Corporation its

Balance Sheet, in handwritten form, as at September 30, 1967.

- 11. At the closing, on or about December 1, 1967, defendant Lybrand present d said handwritten Balance Sheet, attached hereto, marked Exhibit 2, to plaintiff and plaintiff relied thereon in closing the aforesaid Purchase Agreement. At said time Lybrand represented to plaintiff that the figures reflected in said handwritten Balance Sheet would appear without material change in a certified Balance Sheet which Lybrand would prepare and submit to plaintiff. Shortly after the closing, Lybrand delivered to plaintiff an audited Balance Sheet of Levitt Manufacturing Corporation, dated as of November 20, 1967, with its certificate attached thereto. Said Balance Sheet is attached hereto marked Exhibit 3.
- defendant Lybrand renders said certificate under the governing principles, rules, custom and usage of the accounting profession a "piecemeal" certificate. Defendant Lybrand stated that, because it was unable to satisfy itself as to the pricing of the physical inventory at the Balance Sheet date (although it was satisfied as to quantities), it was: "not able to express an opinion on the inventory or on related accounts that are affected by inventory such as cost of sales, income tax liability and expense, not income and retained earnings." Defendant Lybrand then stated that:

"Because of the materiality of these matters, we express no opinion on the accompanying balance sheet taken as a whole.

"However, in our opinion, the assets, liabilities and capital included in the accompanying balance sheet, other than inventory and the related accounts referred to above, are fairly presented in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year."

Because of the foregoing, defendant Lybrand expressed no opinion whatsoever on the Statement of Income for the fiscal y. ... ended September 30, 1967, which Statement of Income was appended to the aforesaid Balance Sheet and is a part of Exhibit 3 annexed hereto.

- 13. Poloron relied on the accuracy and authenticity of the handwritten Balance Sheet attached hereto marked Exhibit 2, and in reliance thereon, consummated the purchase agreement on or about December 1, 1967.
- and submitted by Lybrand and on which plaintiff relied, (a) was false and misleading, (b) contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) operated as a fraud and deceit upon the plaintiff, in that, in truth and in fact, said Balance Sheet understated the liabilities and overstated the assets and net worth of Levitt Manufacturing Corporation as of September 30, 1967, by at least \$222,000.
- tion, subsequently renamed "Poloron Products of Indiana, Inc.," (hereinafter referred to as "Poloron Indiana"), by plaintiff's auditors for the fiscal years ended September 30, 1968 and September 30, 1969, said auditors reported the discovery of \$122,687.00 and \$59,095.00, respectively, in liabilities of Levitt Manufacturing Corporation existing as of September 30, 1967, and undisclosed by Lybrand in said handwritten Balance

Sheet prepared and submitted by Lybrand as of that date. Plaintiff's auditors have discovered additional overstatements of accounts receivable and under statements of accounts payable aggregating approximately \$40,000.00. The foregoing undisclosed liabilities and overstated assets amount to a total of approximately \$220,000.00 by which amount the net worth of Levitt Manufacturing Corporation as at September 30, 1967, was overstated.

- 16. In connection with the purchase by plaintiff of all the stock of Levitt Manufacturing Corporation and in connection with the preparation and presentation of the aforesaid handwriften Balance Sheet of Levitt Manufacturing Corporation, the United States mails and other means of communication and instrumentalities of interstate commerce were used.
- 17. The aforesaid conduct of defendant Lybrand constituted a violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)) and Rule 10b-5 thereunder.

WHEREFORE, plaintiff prays that this Court enter judgment on its behalf against defendant Lybrand, Ross Bros. & Montgomery in the amount of \$220,000, plus interest and intiff's costs incurred in this action. Plaintiff demands a pary for the trial of this cause.

Dated: New York, New York March 11, 1974

GOLD, FARKELL & MARKS

A Member of the Firm Attorneys for Plaintiff 595 Madison Avenue New York, New York 10022

(212) 935-9200

FEIWELL & GALPER 33 North La Salle Street Chicago, Illinois 60602 (312) 782-4844

Oct 27,1961

Coloran Product he and the stockholden of Linto Manufactioning Corporation have this de Iterested the annexed untract on the understanding that in consideration of Poloron participating with First rational City Bank, Huberhomen dincin in advances being made to Levith mencifestining Corporation to the extent priviled in a genterepition agrament being executestoday, Polism Shell here the option of termenating all of its obligations under said annield contract at any time prin to the close of business on Wednesday hovember 1, 1907 on the meantime the said of executed contract shall be held in lecrow by nathaniel Whitelern. of Poloron exercise its often by alorsing Whitelern that it derives to terminets the intert he whill remove the se and related letters (or destroy auch segmentines) and If Polain does not lipercial its said often Whitehin abell on dor 2, 1967 deliver in executed of copy of said untrest (and letters) to end Plan and one to Signed Lent on behilf of all the silling straholders. Polow Freducto, 1to the selling stocktolder Trancel of holita Elerancijem

AGRESHELT dated as of October , 1967, between FOLORON PRODUCTS: INC., a New York corporation (hereinafter called the "Poyer"), LEVITT MANUFACTURING CORPORATION, a New York corporation (hereinafter called the "Company") and SAMUEL LEVITT, JACK WHITHEY, DAY LEVITT and CARL LEVITT (hereinafter collectively called the "Sellers"):

Euger and Euger desires to purchase from the Sellers, all of the outstanding stock of the Company upon the terms and conditions herein set forth:

NOW, THEREFORE, in consideration of the premises and of the mutual agreements hereinafter set forth, the parties hereto hereby agree as follows:

1. Representations and Certain Agreements of Sellers
Each of the Sellers hereby represents and warrants to Edyer,
and hereby agrees as follows:

A. The Company is a corporation, duly organized, validly existing and in good standing under the laws of the State of New York, has the corporate power and authority and is otherwise fully qualified and entitled to own, lease or operate its properties and to carry on its business as it is now being conducted, and is duly qualified to do business as a foreign corporation and is in good standing in all other jurisdictions in which the character of the properties owned, leased or operated by it or the nature of the business conducted by it makes such qualification necessary. The authorized capital stock of the Company consists of 200 shares without

Company consists of an aggregate of 100 shares of Common stack, all of which chares have been validly issued and arguly paid and non-assessable, and there are not outstanding any subscriptions, warrants, options, calls, commitments or other agreements of any character obligating the Company to issue any additional shares of its capital stock or any obligations convertible into or exchangeable for any such shares. The Company has no subsidiaries.

- of shares of the Company's Common Stock set forth opposite their respective names at the foot of this Agreement, have full power and authority to sell and deliver to Euger such shares in accordance with the terms of this Agreement, and upon delivery thereof as herein contemplated, Buyer will receive good and marketable title to said shares, free and clear of all claims, liens, pledges and encumbrances of any kind, nature or description.
- D. The copies of the Company's Certificate of President of the Company)
 Incorporation (certified by the Sepretary Deliverate State and Office Wilder Estate Office State and Company's By-Laws (certified by the Company's Secretary President under date of October 20, 1967) which have been delivered to Buyer, are complete and correct.

105 A

"i "otion

EXHIBIT B TO THIRD PARTY COMPLAINT ... Comment put a reverst to say a, was an at 1 code 31, 15 4, 6 cod 1 13, 19 4, 15 11, 19 4/2 12 Luguet 31, 1977, on auditod inflance check of the Company of his Deptember 30, 1950 and an audited Income abstracts of the Gregory for the twelve smoother anded September 30, 1966, unwellted Income 55 Sements of the Company monthly and cummitatively from Ontoner 1, 1955 to and for the months enting on Fresh 31, 1964, Lpc11 30, 7957, Kay 31, 1967 / respectively, and an unsuited income abstract of the Company for the eleven months ended August 31, 1977. Said statements are correct and or date out fairly present the financial condition of the Company of at the afformatil respective dates, and the results of operations of the Company for best periods, respectively, in conformity with generally accepted accounting peto lples apolted on a constatent beats throughout said periods. Since August 31, 1947, town his been no che may in the financial confliten of the Company as drown in maid between abset as at August 31, 1057, other than changed which have occurred in the ordinary course of backerse, none of which have been faterially adverse, except that the deepany will though a loss of for the probable of a lague 1 31, 1007 to the Chanies Date in an amount not in excess of \$000,000.00. Who Dellines are not amove of any fact or condition which would materially affect the profitability of the company (in the year 1967 or in any future year, which has not been disclosed to the larger in writing.

F. At Arguet 31, 1837, the Company had no liebilities of any kind or rature, whether absolute or contingent, except sales correntles given in the ordinary course of business 106 A COMPLAINT B TO THIRD PARTY COMPLAINT AND ALL AND A 31 AND A 31 AND ADDRESS OF THE PARTY OF

for every distribution of the charges not in excess of \$30,000.

attached hereto, there are no actions, suits or proceedings at law or in equity pending, or, to the knowledge of the Seller-Johnson profestional state of the Seller-Johnson profestional threatened against or affecting the Company or its properties or business, or the transactions contemplated by this Agreement, before or by any federal, state or municipal court or any governmental commission, board, agency or instrumentality, nor is there any basis known to Seller-Market and
H. To the best of the knowledge, information the and belief of/SellersznikezchkofkthaxShareholderskkthe Company has complied with all laws and governmental regulations and orders applicable to its business.

Dy the Company prior to the date hereof of every kind and nature and whether for itself or others, including but not limited, to employees' withholding taxes, have been properly determined in accordance with applicable rules and regulations and are properly reflected in the financial statement referred to in the analyzadd. All Such taxes which may have account heretofore

....

but which are not yet payable are properly reflected in the financial statements referred to in the foregoing sub-section E. There are no agreements by the Company for an extension of time for assessment of any tax, and the amounts set up as provisions for taxes August 31 on said balance sheet of the Company as at September 30, 1967, are sufficient for the payment of all accrued and unpaid federal, state, county and local taxes of the Company for the period then

ended and for all fiscal years prior thereto.

A. You Congress twent to real property Americal hareto as Emilial B Is a brief description of all real proportion which are leased to the Congary, lackwilled all plants and structures located thereon. A copy of each such lease has heretofore been delivered to Dayer by Seller! Each such leasehold estate purported to be granted by each such lease is owned by the Company and each such lease is in good standing, valid and enforceable in accordance with its To the best of Sellers' knowledge and belief, terms. / all improvements in or on promises subject to such leases conform to all applicable state; county and local laws including, without limitation, zoning, building and safety ordinances. There is not under any of such leases any existing default or event of default or event which, with notice or lapse of time or both, would constitute a default by the Company. The plants, and the machinery and equipment of the Company currently in operation, are in good working condition and in a state of good maintenance and repair.

Annexed hereto as Exhibit I is

K. The Seller heretofore marked for

identification; and well-vered to Buyer; a list of substantially

all the machinery, equipment, tools, dies, drawings and plans,

furniture, fixtures and automobiles owned by the Company. The

Company owns outright all the machinery, equipment, tools, dies,

drawings and plans, furniture, fixtures and automobiles des
cribed in said list, other than personal property leased by the

Company pursuant to leases listed in Exhibit D hereto, and owns

outright all other assets and properties reflected in the above

mantioned talance sheet of the Company as at September 30, 1967,

except for builters the amount of which is filled in the above is

mantioned talance sheet of the Company as at September 30, 1967,

except for builters the amount of which is filled in the above is

or acquired after said date, other than such assets or properties

sold or otherwise disposed of in the ordinary course of business

subsequent to said date and prior to the date hereof, in each

hadren of red cather thetherver, emept the lich of the first betternal city Enek, Rebeshean Division, and a lich in favor of Gardex in the amount reflected in the aforesaid balance sheet.

L. The receivables shown on the Company's balance sheet as at August 31, 1957 and thereafter acquired, accordance were obtained pursuant to sales in the ordinary course of business and, except as set forth in Exhibit X, Sellers have no reason to believe that such receivables will not be collectible in the ordinary course in amounts not less than the amounts thereof carried on the books of the Company.

August 31, 1957 balance sheet, or thereafter acquired, are of good and merchantable quality. The Sellers have no reason to believe that any product or equipment heretofore sold by the Company or now held in inventory is not of good workmanship or material, except for contingent adjustments on goods and equipment heretofore sold not to exceed \$40,000, or fails to comply with any express or implied warranty made or to be made upon the sale thereof by the Company.

N. Annexed hereto as Exhibit C is a brief description of the patents, trademarks, trade names and copyrights owned by or registered in the name of the Company or in which it has rights of any nature. The Company owns or possesses adequate licenses or other rights to use all patents, trademarks, trademarks or other rights to use all patents, trademarks, trademarks and copyrights necessary to conduct its business as now operated by it, and has not received any notice of conflict, and to the knowledge of Sallersand transferance there does not exist any conflict, with the asserted rights of others with respect thereto. The Company is not a lie maor in respect of any patents, trademarks, trade names, copyrights or applications for any thereof.

9. Example for the contrasts described A hits. It charged hereto, copies of which have been fellowed to dayer by the Collers, the Company As not a party to ore bound by any contract not made in the ordinary course of business and is not a party to or bound by any (1) contract for the employment of any officer or individual employee which is not immediately terminable without cost or other liability to the Company on or at any time after the Closing Date, (2) contract for the future purchase of materials, supplies, equipment or cervices not cancellable by the Company on 90 days notice, (3) distributor or sales agency or advertising contract not terminable by the Company upon 60 days notice, (4) contract with any labor union, (5) contract for the future sale of its products at prices less than the net early buy scheduled list prices set forth in Exhibits Dl and D2 attached hereto, (6) indenture, mortgage, loan or credit agreement, (7) bonus, pension, profit sharing, retirement, stock option, stock purchase, hospitalization, insurance or other plan or agreement providing benefits to any employee or shareholder of the Company, or (3) lease (other than the leases referred to in the foregoing subsection J). The Company has in all material respects performed all obligations required to be performed by it, and is not in default, under any of the agreements or other instruments to which it is a party and no event has occurred and is continuing under the provisions of any such agreement or instrument which, with the lapse of time or the giving of notice, or both, would constitute a default or an event of default thereunder.

P. To the best of the knowledge, infor-

the ordinary compare of business and is not a party to be bound by any out configuration of the matrix described in the foregoing subsection O.

ere insured for the benefit of the Company against all risks usually insured against by persons operating similar properties in the localities where such properties are located, under valid and enforceable policies issued by insurers of recognized responsibility and such insurance is in such amount as is required to reasonably protect the Company against the risks covered thereby. The Sellers will cause the Company to continue to maintain such insurance coverage to and including the Closing Date.

R. Since . August 31, 1967, .. the Company has not, except as otherwise contemplated hereunder or provided herein or in any written schedule or exhibit delivered hereunder (1) issued any shares of stock, notes, warrants, options or other corporate securities, (2) incurred any obligation or liability, absolute or contingent, except current liabilities incurred, and obligations under contracts entered into, in the ordinary course of business, (3) discharged or satisfied any lien or encumbrance, or paid any obligation or liability (absolute or contingent) other than current liabilities shown on said balance sheet of the Company as at August 31, 1967, and current liabilities incurred since said date in the ordinary course of business (4) declared, set aside or made any payment or distribution to shareholders or purchased or redeemed any of its capital stock, (5) mortgaged, pledged or subjected to lien, charge .. or any other encumbrance any of its assets, tangible or intangible, (6) sold, assigned- - -

or law afterest a , of the tractate abants, a concerned ent like a carina, except in the ordinary course of . basis was, (7) suffered any extended threy looses or walved, any rights of substantial value, (8) entered into any material transaction other than in the ordinary course of business, (9) made capital expenditures in excess of an appregate of \$50,000, (10) sold, assigned or transferred any patents, trademarks, trade names, copyrights or other intangible assets, or (11) granted any general or uniform increase in the rates of pay or benefits incidental to employment of its employees; whether or not in collective bargaining units. The net worth of the Company which will be shown on the balance sheet of the Company as at September 30, 1957 to be prepared and certified by Lybrand, Ross & Montgomery pursuant to their audit which they are now conducting, will be not less than the net worth shown on the August 31, 1967 belance sheet of the Company referred to in Section 1E - hereof, less \$200,000.

- S. The execution and carrying out of this Agreement and compliance with the provisions hereof by the Sellers will not conflict with, or result in, any breach of any of the terms, conditions or provisions of, or constitute a denual tunder, or result in the creation of, any lien, charge or encumbrance upon any of the properties or assets of the Company pursuant to any corporate charter, by-law, indenture, mortgage, lease, agreement or other instrument to which the Company is a party or by which it is bound.
 - The Company will not, without the prior written consent of .

 Buyer, do any of the things listed in clauses (1) to (11), inclusive, of the foregoing subsection R.

W. No representation or warranty of Sellers on McCochoooChamahoddance in this Agreement, or in any schedule, certificate or other document furnished or to be furnished to Euger by Sellers, bbsochasahoddunsyor the Company pursuant herabo, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact required to be stated therein or necessary to make the statement contained therein not misleading.

- 2. Representations and Certain Agreements of Buyer.

 Buyer represents, warrants and agrees as follow:
- A. Buyer is a corporation, duly organized, validly existing and in good standing under the laws of the State of New York.
- B. The execution and performance of this Agreement have been duly authorized by the Board of Directors of Buyer and Buyer has the corporate power to carry out the transactions on its part to be carried out hereunder.
 - c. The shares of Class A Stock of Buyer to be delivered hereunder to the Seller 12 11, when so delivered, be duly and validly authorized and issued stock of Buyer, fully paid and non-assessable.

to rever, free and clear of all liens, pleases and ensugarances of my kind, certificates for the number of shares of Comon stock of the Company set footh opposite their respective names at the foot hereof, duly endorsed in blank, with signatures guaranteed, and with all requisite stock transfer stamps attached.

B. In consideration therefor and in complete and full payment for all of the foregoing shares of stock to be delivered by Sallers horeunder, Buyer shall (1) at the Closing pay to Samuel Levite for and on behalf of all the . Sellers, \$11,200 in cash, and (ii) within one hundred twenty(120) days after the end of each of the Company's fiscal years ending in 1968, 1969 and 1970, or within five (5) days after the determination referred to in subsection C(iv) below with respect to each such fiscal year, has become binding upon Sellers, whichever be later, issue and deliver to Sellers as hereinafter provided, such number of whole shares, if any, of Euver's Class A Stock which in the aggregate shall equal up to but not exceeding \$2,500,000 of. in value 20% of the Company's pre-tax earnings/incoxcessiof such earnings \$500,000 for each such fiscal year. For purposes of this Section 3.E., the Class A Stock of Euger shall be valued at \$35 per share, subject to adjustments for woodkindermaryx stock dividends, stock splits, reclassifications and like transactions after the date hereof. All such shares of Euger's Class A Stock to be issued and delivered to Sellers hereunder shall be issued and deliver to Sellers in proportion to the respective number of shares of Common Stock of the Company set forth opposite their respective names at the foot hereof.

C. For purposes of Section 3.B.:

November 30 in order to coincide with its own fiscal year, on November 30 of such year, provided that such changed fiscal year shall cover a period of no less than twelve calendar months.

- (ii) The pre-tax earnings of the Company for each fiscal year shall be determined by the independent accounting firm then servicing the books of Euger in accordance with generally accepted accounting principles applied on a consistent basis.
- carnings of the Company shall be based on the business and assets of the Company as it is being operated on the date of the Closing hereunder. If such business is operated as a comporate division, whether by a marger or consolidation with or into Buyer, or a subsidiary of Buyer, or for any other reason, then the pre-tax earnings shall be computed on the basis of pre-yax earnings attributable to the assets and business owned or conducted by the Company as of such marger consolidation etc. Nothing herein contained shall prohibit the Buyer from adding of ar products to the business of the Company or eliminating any products carried or to be carried by the Company whether it be operated as a separate corporation or division.
- (iv) The independent accounting firm employed by the Company as its auditors shall make all determinations with respect to the amount of pre-tax earnings required to be determined under Section 3B and 3C and the number of shares of Class A Stock of Buyer deliverable hereunder. The Company shall

cosh fiveal year of the Company. Such deterwinstion shall be binding and conclusive upon
Sellers unless within ten (10) days after
delivery thereof all of the Sellers notify
Buyer of their objections to such determination.
The Sellers shall thereupon designate a firm of
certified public accountants to confer with the
Company's auditors for the purposes of resolvins
any disputes in connection with such determination
and such Sellers auditors' shall have reasonable
access to such books and records as may be necessary to resolve such dispute.

In the event that the accountants designated by the Sellers and the Company's auditors shall not be able to resolve any such dispute within fifteen (15) days after the receipt by the Euger of the Sellers' objections, the matter shall be submitted to Price Waterhouse & Co., whose determinations half a final and conclusive. The fees and expenses incurred in connection with the engagement of Price Waterhouse & Co., as herein provided, shall be borne one-half by the Company and one-half by Sellers, each of whom shall be jointly and severally liable for one-half of the total costs.

4. Investment Representations.

A. Each Seller represents and covenants that any Class A Stock of Euger to be acquired by him hereunder will be acquired by him for investment, without any intention of reselling or distributing same and that upon each delivery

divide to imports obligation to deliver such shared of stock, deliver to imports letter, dated as of the day of delivery of such stock, in such form as may reasonably be escaptable to counsel for Buyer, confirming that such stock is taken for investment, without any intention of recelling or distributing same.

- 5. Closing. The Closing hereunder shall take place at the office of Mayo, Sklar & Herzberg, 200 Park Avenur, Cill Mew York, New York, at 2:00 P.H., on Noussian 1, 1957, or at such other time and place as the parties shall mutually agree upon in writing. The term "Closing Date" as used herein shall mean the date on which the Closing hereunder shall be consummated.
- Obligations. The respective obligations of Buyer and Sellers hereunder are at the option of Buyer and of the Sellers respectively, subject to the conditions that on or before the Closing Date no action or proceeding by or before any court or other governmental body shall have been instituted or threatened to restrain, prohibit or invalidate the transactions contemplated by this Agreement or which might affect the right of Buyer to own and operate as its subsidiary after the Closing Date the business and property of the Company.
 - 7. Conditions Precedent to the Obligations of Euyer.
 Unless the following conditions are satisfied on or before
 the Closing, the Euyer shall in its discretion not be obligated
 to consummate the transactions contemplated herein:

- A. Euger shall not have discovered any material ergor, misstatement or omission in the representations and warranties made by Sallers and all the terms, covenants and conditions of this Agreement to be complied with and performed by Sellers or the Company, on or before the Closing Date, shall have been complied with and performed, provided, however, that anything herein to the contrary notwithstanding and without affecting the efficacy or the validity of the warranties and representations made herein, Buyer agrees that it will not refuse to close on the grounds that this Section YA has not been satisfied, if the effect of any breaches, misstatements and misrepresentations by Sellers herein is to reduce the Company's net worth as of September 30, 1967 by not more than \$400,000 from the net worth as shown on the Company's balance sheet as of August 31, 1967 referred to in Section 12 herein. Whether or not the balance sheet as of September 30, 1957, as prepared by the accountants shall reflect a liability for income taxes due with respect to the year ended September 30, 1955, if the loss suffered during the year ended September 30, 1967 shall result in a carry back credit of at least that amount, then unless such carry back shall be reflected as an asset on such belance sheet, such liability shall be eliminated in determining the net worth of the Company as of September 30, 1967 for all the purposes of this Agreement.
- B. Samuel Levitt shall have entered into a Sales Representative's Agreement with the Company in substantially the form attached hereto as Exhibit G, which Agreement is assignable by Levitt to a corporation owned or controlled by Levitt (and Samuel Levitt hereby agrees to enter into such

Sites Representative's Agreement at or prior to the Closing) and on the Closing Date such Agreement shall be in full force and effect.

- shall not have been adversely affected in any material way as the result of any fire, explosion, accident, riot, civil disturbance, since, boycott, lockout, flood, drought, storm, carthquake, embargo, or other casualty or Act of God or the public enemy. There shall have been no changes in the business, properties or financial condition of the Company since August 31, 1967 which would have a material adverse affect on the value of the business of the Company, except as contemplated herein.
- D. All actions, proceedings, instruments, opinions and documents required to carry out this Agreement or incident thereto, and all other related legal matters, shall have been approved by Messrs. Mays, Sklar & Merzberg, counsel for Euyer.
- E. Buyer shall have received the opinion of George Feiweil, Esq., counsel for Sellers, addressed to Buyer

In the company is a componentian duly organized, validly existing and in good standing under the laws of the State of New York, and has the corporate power to own the property it owns and to carry on the business it carries on, and is duly qualified to do business and is in good standing as a foreign corporation in all jurisdictions in which the character of its properties or the nature of its business make such qualification necessary.

- (2) The Company's authorized capital stock consists of two hunired shares of Common Stock, without par value, 100 shares of which are issued and outstanding, fully paid and non-assessable and owned by the Sellers in the amounts set forth opposite their respective names at the foot hereof.
- (3) No provision of the Articles of Incorporation or the By-Laws of the Company, or any contract known to said counsel (after due inquiry) to which the Company is a party or by which either is bound, requires the consent or authorization of any person; firm or corporation as a condition precedent to the consummation of this Agreement or the transactions contemplated herein.
- (4) This Agreement has been duly executed and delivered by the Sellers and is a valid and binding obligation of each of the Sellers in accordance with its terms and that upon the

EXHIBIT B TO THIRD PARTY COMPLAINT

(application by Sellers to Devel of the Company set forth opposite their respective news at the foot hereof, as contemplated herein, Duyer will be fully vested with all the right, title and interest in and to all the outstanding stock of the Company, free from any claims and encumbrances of any nature whatsoever.

- (5) The Sales Representative's Agreemed referred to in Section 43 herein has been duly executed and delivered by the Company and Samuel Levitt, and is/valid and binding obligation of the Company and Samuel Levitt in accordance with its terms.
- (b) No action or proceeding by or before any court or other governmental body shall have been instituted or threatened to restrain, prohibit or invalidate the transactions contemplated by this Agreement or which might affect the right of the Company to own, operate and control after the Closing Date, its assets, property and business.
- P. Except as otherwise contemplated herein, the representations and warranties made by the Sellers in this Agreement or in any instrument delivered pursuant thereto, shall be true and correct, on and as of the Closing Date, with the same effect as though all such representations and warranties had been made on and as of the Closing Date, and Buyer shall have received a certificate, dated the Closing Date, and signed by each of the Sellers to the foregoing effect.

resignations of all of the officers and directors of the Company. Sellers agree at or before the Closing to cause all necessary corporate proceedings to be taken (in form and substance cathefactory to counsel for Euger) to elect designees of Euger (whose nesses shall be furnished to Sellers no later than five (5) business days prior to the Closing Date) as directors of the Company.

H. Each of the Sellers shall have executed and delivered to the Company (and Sellers hereby agree so to do) general releases of any and all claims they may have against the Company, except for the loan of Samuel Levitt to the Company in the principal amount of \$109,630 plus interest thereon on unpaid balances at the rate of 4% per annum from the Closing Date to the date of repayment.

- 8. Conditions Procedent to the Obligations of Sallers.
 The obligations of the Sallers are, at the option of all the Sallers (acting together) subject to the condition that, on or prior to the Closing Date:
- A. The representations and warranties made by Euger in this Agreement shall be true and correct, on and as of the Closing Date, with the same effect as though all such representations and warranties had been made on and as of the Closing Date.
- B. Buyer shall have delivered to Sellers a certificate signed by the Secretary or an Assistant Secretary of Euger and under its corporate seal certifying the resolutions of the Eoard of Directors of Euger authorizing the execution and delivery of this Agreement.
- opinion of Hays, Sklar & Herzberg, counsel for Euger, addressed to Sellers and dated the Closing Date, in form and substance satisfactory to the Sellers and its counsel, to the effect that:

- (1) Enjoy is a composation duty ortentant, velidly existing and in good storelist,
 unless the laws of the State of new York.
- (2) The Euger has full authority to make, execute, deliver and perform this Agreement has been duly authorized and approved by proper corporate action of Buyer and constitutes the valid and legal binding obligation of Buyer in accordance with its terms.

NO SECTION 9

10. Indemnistication by Sallers.

A. Sellers, jointly and severally, agree to indennify and hold the Euyer harmless against and in respect of losses sustained by it by reason of the following: claims against the Company of any nature, whather accreed, absolute, contingent or otherwise existing at September 30, 1957, to the extent not reflected or reserved against in full in the Company's balance sheet as at ... September 30, 1957 referred to in Section 18 hereof.

- (ii) Any and all damage or deficiency resulting from any misrepresentation, breach of warranty or covenant or non-fulfillment of any obligation on the part of the Sellers hereunder not otherwise embraced within subsection A(i) above.
- (iii) Any and all actions, suits and proceedings, demands, assessments, judgments; costs and legal and other expenses incident to the foregoing.
- B. Buyer shall have the right, at its election, to charge any amount due or payable to it by Sellers under Sellers' indemnity herein contained, including the amount, if any, by which the net worth of the Company, as shown on the Company's balance sheet as at August 31,1967, referred to in Section 1(e) herein, exceeds by more than \$200,000 the net worth of the Company as shown on the certified balance sheet of the Company as at September 30, 1967, referred to in Section 1R herein, against the shares of Euger's Class A Stock to be delivered to Sellers pursuant to Section 3 and to deduct therefrom such number of whole shares of Class A Stock as will fully reimburse Euger for the amount of its claim against Sellers, or any of them, (for purposes herein, such shares of Euger's Class A Stock shall be valued as provided in Section 3); provided that Sellers shall have the right within ' thirty (30) days after notice of any claim by Euger hereunder to sat: fy such claim or deficiency in lieu of having such claim set off against the Class A Stock deliverable hereunler,

124 A

EXHIBIT B TO THIRD PARTY COMPLAINT

of this Agreement (a) Sellers shall effect, intefall
common the Company to afford, to the officers and subjected
representatives of Euger, free and full access to the plants,
proporties, books and records of the Company in order that Euger
may have full opportunity to make such investigation as it shall
desire to make of the affairs of the Company, and (b) Sellers
shall furnish, and cause the officers of the Company to furnish,
to Puyer and its authorized representatives such a Mittienal financial and operating data and other information as to the business
and properties of the Company as Buyer shall from time to time
reasonably request.

- All representations and warranties made by Sellers in this
 Agreement, or on the Closing Date, as required hereunder,
 shall remain operative and in full force and effect, regardless
 of any investigation made by or on bahalf of Buyer, and shall
 survive delivery of the Common Stock by Sellers to Buyer and
 any delivery of Class A Stock by Euger to Sellers.
- a finder's fee in the event that the transaction contemplated by this Agreement shall be consummated. Sellers represent and warrant to Euger and Euger represents and warrants to Sellers that all negotiations relevant to this Agreement have been carried on by them without the intervention of any other broker or finder. Sellers, jointly and severally, agree to indemnify

chitalfers in materia, applicat and in respect of any elits for brokerage or finish's consisting in breach of their imposting constants herein contained.

16. Covenant Not Wo Compete. Each Seller agrees that for a period of three (3) years from and after the

Closing Date he will not in any minner, directly or indirectly, inems of minifacturing or selling power lawn mowers, ride around mowers, or in the engage in the business which competes with any of the businesses in which the Company may not be engaged and he will not, directly or indirectly, own, manage, operate, join, control or participate in, the ownership, management, operation or control of, or be employed by, or connected in any manner with, any corporation, firm or business that is so engaged. It is understood and agreed that the remedy at law for breach by any the Sellers of the covenantscontained in this Section 14 will be inadequate, and that the Company and Buyer shall be entitled to injunctive relief. Such covenants shall constitute independent and separable covenants which shall be enforceable, notwithstanding any rights or remedies which Sellers may have under any other provision of this agreement.

15. Notices. Any notice, request or other document to be given hereunder to any party shall be in writing and delivered personally or sent by registered mail, postage prepaid, if to one of the Sellers, to the address filed by such Seller in writing with Euyer, or if no such address shall have been so filed, to such Seller, in care of Samuel Levitt, 230 Fifth Avenue, New York, N.Y. with copy to George Feiwell, 33 North LeSalle Street, Chicago, Illinois; and if to Buyer, addressed to Euyer, attention of its President, 165 Huguenot Street, New Rochelle, New York, with a copy to Messrs. Hays, Sklar & Herzberg, 200 Park Avenue, New York, New York 10017, attention Nathaniel Mnitchorn, Enq.

- ment shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, representatives, successors and assigns. Nothing in this Agreement, express or implied, is intended to confer upon any person other than the parties hereto and their respective successors in interest, as aforesaid, any rights or remedies under or by reason of this Agreement.
 - contains the entire agreement between the parties hereto whill respect to the transactions contemplated hereby and this Agreement may not be changed or terminated orally, but only by an instrument in writing signed by the parties hereto. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York.
 - and agree that pending the Closing they will cause the Company, from and after the Closing hereunder, not to borrow any funds, secure any advances, pledge or encumber any of its assets, from or with The First National City Pank, Hausschman Division, or with any other party,

in writing by John Mirwyk. Sellers further coverent and agree that simultaneously with the execution of this foreseast, the Company will assent its bank resolution with The First National City Bank, 55 Wall Street Branch, so as to require the signature of John Narwyk as a required co-signer on all checks drawn on the account of the Company and to keep such banking arrangements in full force and effect until the Closing hereunder and until said Closing, to maintain its banking arrangements as they now exist and not secure any additional depositories or banking accommodations.

right, remedy or option under this Agreement, or delay by
Puyer in exercising the same, will not operate as a waiver
and no waiver by Buyer will be effective unless it is confirmed in writing and then only to the extent specifically
stated. It is specifically understood that, without limiting
the foregoing, the assent to Buyer to the Closing hereunder,
shall not be deemed a waiver of its right to reimbursement
from Sellers as provided herein in the event that the net
worth of the Company as shown on the balance sheet as at
September 30, 1967, to be prepared and certified as provided
in Section 1R hereunder is not as represented herein.

bird tensounly with the execution of this Agreement, to maint its bank resolution with the Pirat Matientl City Bank, 55 Well Street Branch, so as to require the alguature of John Marnyk as a required co-signer on all checks drawn on the account of the Company, and to keep such banking arrangements in full force and effect-until the Closing bereunder and until said Closing, to maintain its banking arrangements as they now exist and not secure any additional depositories or banking accommodations.

20. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

IN WITHESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

Stock Ownership in Levitt Manufacturing Corporation

Stock Ownership in Levitt Manufacturing Corporation

Samuel Levitt - 40 shares

Jay Lavitt - 2 shares

Cari Lavitt - 21 shares

Exhibit A

Clements Hox Company v. Levitt Manufacturing Corp. Amount in dispute approximately \$16,000.

Amount in dispute approximately \$5,000. Accrued legal expenses to Lemmel T. Jones \$2,300 plus costs.

Levitt Manufacturing Corp. v. Yardman of Illinois pending in the United States District Court for the Northern
District of Illinois.

Levitt Mfg. Corp. v. Nasco, et al., pending in the Circuit Court, Milwaukee, Wisconsin. Amount in dispute approximately \$38,000.

Miscellaneous collection matters wherein Levitt is plaintiff.

RESTRICT B

Lease by and between the Company and Garden City Land Corporation, dated June 28, 1986, covering the Company's plant in Michigan City, Indiana.

EXHIGINA C

U. S. Trailemarks

- 1. Gardex
- 2. Floatwool Application Pending
- 3. Stallion
- 4. Fleetlann Application Pending

Leases

- Lease dated December 1, 1966 by and between Associate Leasing Corporation of Indiana, Lessor, and Levitt Manufacturing Corporation.
- 2. Lease dated January 4, 1967 by and between Associate Leasing Corporation of Indiana, Lessor, and Levitt Manufacturing Corporation.
- 3. Lease dated February 28, 1957 by and between Associate Leasing Corporation of Indiana, Lessor, and Levitt
 Nanufacturing Corporation
- 4. Lease of Pontiac, Ford and Plymouth Sedans, a Ford

 Econaline and miscellaneous truck leases, which truck leases
 are terminable on thirty days notice.

· Employment Contracts

Employment Agreement with Frank Wolf, at \$7,500 per year, as of June 30, 1956, for a period of five years.

Contracts for Future Sale of the Company's Products at Prices Less than the Net Early Buy Schedu ed List Prices

Custom r		Model No.	•	•	.Unit	Early	Euy !	Pric
Alden's		8732		\$293.93	net	and no	tote	500;
Gamble's		17832		\$293.98			~	

EXEMPET D (cont.)

Labor Voicon Contract

Collective Pargaining Agreement with United

Steel Workers.

Loan Agreements, etc.

First Mational City Bank, Mucschman Division .- Factoring and Receivable Financing Agreement.

Balance Sheet, as at September 30, 1961

	Asset		A THE PERSON OF	
Correct Assets:	Assets			1
Cash				\$ 7 100 97
Trade receivables:			F106606323	
Notes		= 00	9846219	•
Account receivable-Fee	deral Inco	me lax hetus	11638675	
Less Allowance for de	loubt ful	Accounts	11	2:10188675
Inventory nt the low				10625639
Prepaid expenses				3193.3
		,		200170
Total curren	T ASSE	. 53		20917257
Equipment, et cost:				
Office equipment			2518926	
Tooling and dies		•	4771968	
Lensehold improvement	25		124/239	
Less, Accumulated de	preciat	ON	255 813 8	:
	.			
latents and trade name				15000
	N. C.			* 2645692
Total Asse	03	-	-	C73612
_				
	<u>.</u>			
	;	12	1	:

	1
Linbilities And Stockholders' Eg	grily-
Correct linbilities:	
Brok overdrafts	\$ 10532815
Notes payable:	
Back	\$100496768
Newdors	23400745
Other, current portion	60 00000 12939745
Notes payable - Talcott	1 1 1
	13005675
Accounts payable	897073 35
Employees funds withheld	131 465 35
Accreed expenses	43873 2.
Warr ty claims payable	3700000
Total current liabilities	2669831.14
Notes payable	24000000
Less, Corrent parties	6000000 1800000
LOUNS payable, stockholders	1115074
Total linbilities	20/1/29/
	29616386.
51-16/1/	
Stockholders' equity:	
Capital stock, No par value:	
Authorized 200 shares;	
outstanding 100 Shares	10000000
Retained enryings (deficit)	(411.546.89)
Total stockholders' equity	(31651675
Total liabilities and stockholders' eg	26/50923
	, , , , , ,

LEVITT MANUFACTURING CORPORATION

Report on Examination of Financial Statements for the fiscal year ended September 30, 1967

LYBRAND, ROSS BROS. S. MONTGOMERY
CERTIFIED PUBLIC ACCOUNTANTS
SOUTH BEID OFFICE

CONTENTS

			1	Page	5
Auditor's Re	enort .		****	. 1	2
Auditor 5 In			1		
Financial S	tatements:				
Balance S	heet the Balance Sh	neet		4	
Supplementa	ry Financial I	ata · ,	: :	5	
	•	****			٠.
Statement o	f Income				

LYBRAND, ROSS BROS. S. MONTCOMERY CERTIFIED PUBLIC ACCOUNTANTS

COOPERS & LATERANTE IN AREAS OF THE WORLD

To the Board of Directors of

Levitt Manufacturing Corporation:

We have examined the balance sheet of Levitt .
Manufacturing Corporation as at September 30, 1967. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances, except as stated in the following paragraph.

We observed the taking of the physical inventory at the balance sheet date and satisfied ourselves as to quantities. The prices used in valuing the inventory were determined by company personnel. We were not able to satisfy ourselves as to the pricing of the inventory and therefore, are not able to express an opinion on the inventory or on related accounts that are affected by inventory such as cost of sales, income tax liability and expense, net income and retained earnings. Because of the materiality of these matters, we express no opinion on the accompanying balance sheet taken as a whole.

end capital included in the accompanying balance sheet, other than inventory and the related accounts referred to above, are fairly presented in conformity with generally accepted accounting principles applied on a basis consistent with that of the praceding year.

Lightent, Rose Cors, & Monty mery

South Bend, Indiana.
Movember 20, 1957

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. LEVITT MARUFACTURING CORPORATION ..

Constitution of the property of the second of the

EXHIBIT B TO THIRD PARTY COMPLAINT

PALANCE SHEET, as at September 30, 1967.	
· · · · · · · · · · · · · · · · ·	
ASSETS	
rrent assets:	Cu
Cash . \$ 7,100.97	1
Trade receivables: . Accounts \$1,066,363.25 Notes 98,462.19	:
Account receivable, federal income tax refund 4,042.07	
1,168,867.51	
Less, Allowance for doubtful accounts150,000.00 1,018,867.51;	
Inventory, at the lower of estimated cost or market / 1,062,563.98:	
Prepaid expenses 3,193.32 -	lic
Total current assets 2,091,725.78	L
<pre>Iguipment, at cost: Office equipment</pre>	S
. Less, Accumulated depreciation 255,813.80 551,866.56	!
Patents and trade name . 1,500.00 .	:
Total assets \$2,645,092.34	

The accompanying notes are an integral part of the financial statements.

LIABILITIES AND STOCKHOLDERS' WQUITY

1	
	Current liabilities:
Ten or series	Bank overdrafts \$ 105,328,15
Opposes Conditional property	Notes payable: Bank Vendors Other, current portion \$1,004,967.08 234,007.45 60,000.00 1,293,974.53
	Note payable, Talcott Accounts payable Employees' funds withheld Accrued expenses Warranty claims payable 130,056.48 897,093.35 137,485.35 43,893.28 57,000.00
	Total current liabilities 2,669,831.14
	Notes payable 240,000.00
	Loans payable, stockholders
	Total liabilities 2,961,638.63
	Stockholders' equity: Capital stock, no par value: Authorized 200 shares:
	Outstanding 100 shares Retained earnings (deficit) (416,546.29)
	Total stockholders' equity (316,546.29)
	Total liabilities and stockholdows! south
	\$2,645.092.34

KOTES TO THE MALANCE SHEET

for the fiscal year ended September 30, 1967

Note 4: The corporation executed a five year lease of real property with a five year remaind option in Michigan City, Indiana on June 28, 1966. The terms of the lease call for an annual rental of \$53,000. In the second five years, annual rental is payable to the extent that the additional rental is payable to the extent that the property taxes assessed in 1965.

Note B: Notes payable consist of the following notes:

Notes payable - Bank of \$1,004,967.08 arose from accounts receivable financing through the First - Bational City Bank of New York City. The bank holds assigned collateral accounts receivable of holds assigned collateral accounts receivable of \$938,368.05 and a medurity interest in inventory \$938,368.05 and a medurity interest in inventory

and machinery and equipment.

Notes payable - Vennors consist of a series of notes payable to twelve vendors in various monthly instalments and bear interest at rates from 6% to 6 3/1%.

Notes payable of the payable

Notes payable - Other is a non-interest bearing note which arose from the sale of fixed assets. The note calls for principal payments of \$60,000 on September 30, 1968, 1969, 1970 and 1971.

Note C: The Note Payable - Talcott arose in May, 1966 from the financing of purchases from a former supplier. This financing of purchases from a former supplier. This obligation bears interest at 85 per annum after October obligation bears interest at 85 per annum after October 1, 1967. The principal sum is payable in six equal 1, 1967. The principal sum is payable in six equal consecutive monthly instalments commencing November 26, consecutive monthly instalments commencing November 26, 1967 of \$21,376.08 together with accrued interest. 1967 of \$21,376.08 together with accrued interest in James Talcott, inc. holds a security interest in accounts receivable of \$15,974.47 and the corporation's accounts receivable of \$15,974.47 and the corporation's promissory note dated October 31, 1966 which is promissory note dated October 31, 1966 which is personally guaranteed by a corporate officer.

Note D: Depreciation expense of \$197,999 in the fiscal year ended - September 30, 1967 has been deducted in the statement of income.

Note E: Warranty expense has been provided for on the basis of warranty claims submitted to the company.

SUPPLEMENTARY FINANCIAL DATA

The balance sheet referred to in our opinion on ages 1 and 2 are set forth on pages 3 and 4, inclusive, of this eport. Our examination was made primarily for the purpose of endering an opinion on this balance sheet, taken as a whole. The ther data included in this report on page 6, although not onsidered necessary for a fair presentation of the funancial osition, is presented primarily for supplemental analysis purposes. This additional information has been subjected to the audit procedures applied in the examination of the balance sheet.

Because we were not able to satisfy ourselves on the pricing of the ending inventory, we are not able to express an appinion on the appended statement of income which includes related accounts which are affected by inventory such as cost of sales, income tax expense, net loss and retained earnings (deficit).

Lybrand, Less Gras & Wontgomery

South Bend, Indiana November 20, 1967

TOT the fiscal year ended September 30, 1957

	. \$6	,251,372.60
		5,717,584.34
		533,788.26.
r miles		
Gross profits	\$629,853.77 570,692.37	1,200,546.14
end prinistrative expense	<u> </u>	656,757.83
" coerations		50,000.00
		616,757.83
Total outputs provision for		(84,012.21)
The tor federal income tax	and the	532,745.67
	16 30	116,199.38
int loss in learnings, Cotober 1, 1955		\$ (416,546.29)
in 1 carrings, Costolt), September 30	0, 1901 .	

EXHIBIT-0

SALES REPRESENTATIVE'S AGREEMENT

AGREEMENT dated this 1st day of December , 1967, by and between LEVITT MANUFACTURING CORPORATION (hereinafter called "the Company") and SAMUEL LEVITT (hereinafter called "Levitt").

This Sales Representative's Agreement is entered into pursuant to Section 7B of an Agreement dated as of October 77, 1967 (hereinafter called "the Agreement") providing for the purchase by Poloron Products, Inc. (hereinafter called "Poloron") of all the outstanding capital stock of the Company.

The parties hereto agree as follows:

- 1. The Company hereby appoints Levitt as its exclusive sales representative for the period commencing on the Effective Date, as hereinafter defined, and except as provided for in paragraph 6, terminating three (3) years thereafter. Levitt accepts such appointment and agrees during the term hereof to use his best efforts to promote the sale of, to sell and to cause others to sell, the Company's products and to perform such other duties in connection with his activities hereunder as the Company reasonably may request from time to time.
- 2. In full consideration of all Levitt's services and activities hereunder, the Company agrees to pay Levitt a commission of 6% on the first \$7.5 million of shipments to customers by the Company of its products for each year during the thereof and after the Effective Date, and 5% on any shipments in any such year in excess of \$7.5 million. Said commissions shall be based on the Company's invoice price, ------

exclusive of taxes and shipping charges. Commissions shall be paid with respect to each month's shipments during the term hereof on or before the tenth day of the following month. Any commissions paid with respect to merchandise which is returned to and accepted by the Company shall be charged back to Levitt and deducted from any amounts due him hereunder.

- 3. Levitt shall, in connection with his duties hereunder (1) provide and maintain a sales office in New York City, (2) employ and maintain an adequate sales force to solicit the trade and provide the desired market exposure for the Company's products, (3) secure representation of the Company's products at trade shows, including the display and exhibition of such products at the annual Hardware Show generally held in October of each year and at the two National Houseware Shows generally held in January and July of each year, and (4) provide such other facilities and services as may be required of Levitt as the Company's exclusive sales representative in the sale and marketing of the Company's products. Levitt shall bear all costs and expenses incurred in connection with his activities hereunder, except that the Company shall reimourse him for advertising expenses incurred by him in an amount not to exceed \$25,000 for each fiscal year. All persons employed by Levitt shall be his employees and not employees of the Company or of Poloron. Levitt : shall act hereunder as an independent contractor and not as an agent or employee of Poloron or the Company and he shall have no authority to coligate the Company or Poloron in any manner.
 - 4. All sales for or on behalf of the Company shall be subject to acceptance by the Company which shall have the absolute

right in its discretion to refuse to accept any orders, whether produced by Levitt or others, to refuse to make any shipment and to accept such returns with respect to any such shipments as it may determine, provided, however, that if the Company refuses to accept any orders produced by Levitt and does not, within twenty (20) days after such orders are forwarded to it for acceptance, advise Levitt of the reasons for such refusal, such orders shall be treated as if they were shipped in full for purposes only of paragraph 6 herein.

- 5. Levitt agrees to indemnify and hold the Company and Poloron harmless against any damage, loss, liability, cost or expense in any way relating to Levitt's business or his services and activities hereunder or in connection herewith.
- 6. In the event that the aggregate invoice value of shipments made by the Company to customers in any twelve month period ending on June 30 do not exceed \$5,000,000, the Company may, at any time thereafter, upon thirty (30) days written notice to Levitt, terminate this Sales Representative's Agreement.
- 7. This Agreement may not be assigned by Levitt without the Company's written consent, except that Levitt may assign this Agreement to a corporation of which at least 50% of the outstanding stock is owned by him.
- 8. This Sales Representative's Agreement shall become effective on the date that Poloron acquires all the outstanding stock of the Company pursuant to the Agreement, such date being referred to herein as the "Effective Date".

- greement or any renewal hereof he will not directly or indirectly sell, handle, deal in or represent others in the sale of, products which compete with the products manufactured or sold by the Company, provided, however, that in the event the Company proposes to manufacture or sell a new product or item not theretofore manufactured or sold by it, it will so advise Levitt who shall thereupon have 90 days within which to cease any activities theretofore conducted by him with respect to any competing item or product.
- 10. This agreement shall be renewable for successive one year terms on the same terms and conditions herein contained unless prior to the 1st of June preceding immediately the expiration of the original term of this agreement or any renewal term either party advises the other party in writing of his or its intention not to so renew.
- 11. This Sales Representative's Agreement may not be changed or terminated orally and shall be construed and interpreted in accordance with the laws of the State of New York.
- 12. The Company will be entitled to setoff and deduct from amounts payable to Levitt or its assignee hereunder any amounts due or payable by Levitt to the Company or to Poloron under the Agreement or otherwise.

IN WITNESS WHEREOF, the parties here to have caused this Agreement to be executed as of the day and year first above written.

LEVITT MANUFACTURING CORPORATION

Muslim Solh

Samuel Levity

Linbilities And Stockholder	rs' tiqui	ty.
Corrent liabilities:		\$ 10532815
BANK overdrafts		10532815
Notes payable:		\$ 101-10
Bank Vendors		7100496708
		23400745
Other, current portion		60 00000 1298 974 53
Notes payable - Talcott		13005648
Accounts payable		89709335
Employees tunds withheld		13748535
Accrued expenses		4389328
. Warranty claims payable		5700000
Total current liabilities.		266983114
Notes payable		6000000 18000000
Less, Current portion	. 1	1118074
Loans payable, stockholders		
Total liabilities		296163863
TOCAL TRADITIONS		1 2/0/1000
Stockholders' equity:		
Capital stock, No par value:		
Authorized 200 shares;	1	
outstanding 100 shares	!	10000000
Retained earnings (deficit)		(41654629)
Total stockholders' equity		100 000 00 _ (4/16 5/6 29) _ (3/6.5/6 2)
0 1		
Total liabilities and stockhold	lers' equiz	VI-
	"	

.EXHIBIT D TO THIRD PARTY COMPLAINT (

PREPARED BY	Draft 12/167
FOOTINGS BY EXTENSIONS BY PETERSIONS BY SENIOR W.P. No Balance Sheet, as at Septem.	poration ber 30, 1967
Pssets.	
Current Assets: CASH. Trade receivables:	\$ 7,00 97
	98462.19
Account receivable-Federal Income Tax Refund_	
Inventory at the lower of estimated:	
Prepaid expenses	106256398
Total current assets	209172578
Equipment, qt cost:	
Office equipment Factory equipment	25189262
Leasehold improvements	177 196 83 12 423 97: 807 680 36
	25581380 55186656
Patents and trade name	150000
	144
Total Assets	264509234

EXHIBIT E TO THIRD PARTY COMPLAINT

JAN 3 0 1962 -

Messes, Lybrand, Ross Bros. & Montgomery 400 First Bank Building South Bend, Indiana

Dear Sirs:

In connection with your examination of the balance sheet of Levitt Manufacturing Corp., as of September 30, 1967, I hereby certify that, as of that date, to the best of my knowledge and belief:

- All liabilities have been taken up on the books of account, including the liability for all purchases to which title has passed prior to the stated date.
- 2. No asset of the company was pledged or is now pledged as security for any liability except as follows:

The First National City Bank of New York holds assigned accounts receivable and a security interest in inventory and machinery and equipment.

- 3. There were no unused balances of letters of credit outstanding against which no drafts had been drawn.
- 4. There were no contingent liabilities except as reported by attorney George Feiwell. These include
 the following:
 - 1. Detroit Tool & Manufacturing Co. vs. Levitt Manufacturing Corp.
 - 2. Levitt Manufacturing Corp., vs. Nasco Industries, Inc., regarding Milway, Inc.
 - 3. Levitt Manufacturing Corp., vs. Yard Man of Illinois, Inc.
 - 4: Clements Box Company vs. Levitt Manufacturing Corp.
- 5. There were no purchase commitments in excess of normal requirements or at prices in excess of the prevailing market prices, nor agreements to repurchase items previously sold.
- 6. There were:
 - (a) no commitments for purchase or sale of securities or to repurchase the company's stock or any other securities; nor any options given by the company, including options on company's capital stock; nor bonus or any profit-sharing arrangements.

EXHIBIT E TO THIRD PARTY COMPLAINT

- which, in my judgment, might adversely affect the company.
- 7. There were no defaults in principal, interest, sinking fund, or redumption provisions with respect to any issue of securities or credit agreements, or any breach of coverant of a related indenture or agreement.
- 8. Contractual obligations for plant construction and purchase of real property, equipment and patent or other rights amounted to approximately \$ _-0__.
- 9. Except as are reflected in the balance sheet, there were no agreements under which any of the liabilities of the company had been subordinated to any other of its liabilities nor were any receivables owned by the company subordinate to any other liabilities of the debtor companies.
- 10. No rederal income tax returns have been examined and reported upon by the Internal Revenue Service: eturns of the years since 1965 are still open; the provision for unpaid federal income taxes reflected in the balance sheet is adequate to cover any additional assessments resulting from examinations already made or from those to be us to by the Internal Revenue.
- 11. There have been no material changes since September 30, 1957, in respect of any of the above items 4 to 10, inclusive.

Very truly yours,

LEVITT MANUFACTURING CORP.

(name and title of person signing)

November 20, 1957

AFFIDAVIT OF MARTIN R. GOLD SWORN TO SEPTEMBER 20, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff,

-against-

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

AFFIDAVIT

Defendant and Third-Party Plaintiff,

72 Civ. 3834 (WCC)

-against-

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FELWELL,

Third-Party Defendants.

STATE OF NEW YORK) SS.: \ COUNTY OF NEW YORK)

MARTIN R. GOLD, being duly sworn, deposes and says:

1. I am a member of Gold, Farrell & Marks, attorneys in the above captioned action for plaintiff Poloron Products, Inc. ("Poloron-New York"), and for third-party defendants Carl Levitt, Jay Levitt, Dynamark Corporation ("Dyramark") and George Feiwell. I make this affidavit in support of a motion by these parties to dismiss certain claims which have been made against tham by defendant Labrand, Ross Bros. & Montgomery (now known as Coopers & Lybrand, and hereinafter referred to as "Lybrand"). Coloror-New York seeks dismissal of the two counterclaims, asserted against it in Lybrand's answer; the third-party defendants seek dismissal of the second claim for relief alleged against them in the thirdparty complaint.

- 2. For the convenience of the Court, copies of the amended complaint, the answer with counterclaims and the third-party complaint are attached hereto as Exhibits A through C respectively. To avoid overburdening these papers, the attachments to each of those documents, other than Exhibit D to the Third-Party Complaint, are not included in the attachments hereto, but have been filed with the Court.
- 3. The basis for my knowledge of the facts set forth herein is the examination of documents and conversations with my clients, particularly George Feiwell, Esq. Mr. Feiwell has personal knowledge of virtually all the facts set forth herein, I have read the contents of this affidavit to him before signing it, and he has authorized me to advise the Court that if requested he will file an affidavit with the Court attesting to the accuracy of this affidavit. In addition, attached hereto as Exhibit D, is a copy of an affidavit of Mr. Feiwell, sworn to March 8, 1973, previously filed with the court, and containing many of the facts set forth herein.
- 4. The main action alleged in the complaint in this case is a relatively simple one. In capsule form, Poloron-New York, the purchaser of Levitt Manufacturing Corporation ("LMC") in a 1967 transaction, seeks damages against Lybrand, a firm of certified public accountants, for damages sustained in relying upon a financial statement prepared by Lybrand in connection with the transaction. The complaint alleges that the financial statement was prepared in a fraudulent manner, which constituted a scheme to defraud in connection with the purchase and sale of securities, in violation of Section 10(b) of the Securities and

Exchange Act of 1934, and Rule 10b-5, promulgated thereunder. It is alleged that Lybrand's financial statement overstated assets and understated liabilities of LMC, causing plaintiff damage in the abount of \$220,000.

- 5. For a variety of reasons, which are discussed her in, this controversy has been the subject of three separate actions pending in this district, the Northern District of Illinoi, and the Northern District of Indiana. The previous lawsuits have all been voluntarily terminated, without prejudice. Although good reasons existed for each procedural step which has brought the main controversy to joinder of issue in this district, and although the reasons for each such procedural step are well known to Lybrand, Lybrand has now sought to turn the tables, and become the aggressor.
- 5. Rather than litigate the main controversy which plaintiff believes is well founded, Lybrand has interposed a counterclaim against Poloron-New York, and filed a third-party complaint against the former principals of LMC, a corporation controlled by them, their attorney, and Poleron-Indiana, the successor corporation to LMC.
- 7. In these pleadings, which set forth to viable claims for relief and must be dismissed, Lybrand seeks recovery of litigation expenses which it has allegedly incurred in litigating these matters. These claims sound in a conglomeration of malicious prosecution, common law fraud, and securities law violations. In fact, Lybrand has attempted to bootstrap a simple malicious prosecution allegation which clearly cannot be maintained into some kind of securities law fraud, or common law fraud.

- 3. Stripped of its verbiage, Lybrand has conjured a mythical conspiracy among parties to these transactions other than itself, to maliciousl prosecute it in various forums.
- 9. The allegations are insufficient on their face for the reasons set forth in the accompanying memorandum of law. None of the possible theories upon which these pleadings are based is properly pleaded, nor could it be properly pleaded, based upon the facts which have occurred.
- 10. These baseless claims should be dismissed and the main controversy alleged in the complaint should be litigated without Lybrand's attempted diversion of the Court's attention from the real issues.

THE FACTS

- Il. In October 1967, third-party defendants Carl Levitt, Jay Levitt and Samuel Levitt (who has not been served), were the principals of LMC, which manufactured lawn mowers. At that time, they entered into an agreement with Poloron-New York to sell their stock in LMC to Poloron-New York, which represented complete control of the corporation. In exchange for their company, they received a modest sum of cash, consisting of \$11,200. It was first their agreed that they were to be compensated by receiving Poloron-New York stock over the next several years in an amount to be valued as a percentage of the corporate earnings.
- 12. It is important to note that LMC was a big business, handling many accounts, and with very complicated and involved accounting procedures. As in many big businesses, the principals rely upon their accountants to advise them as to all aspects of

the financial operations of their compan, including assets and liabilities. These figures can vary greatly in a brief period of time in any large business. The Levitts relied upon their accountants, Lybrand, to provide them with an accurate statement of the financial circumstances of their company at the time of the transaction.

- 13. In the contract of sale, both parties, therefore, relied upon Lybrand for all financial information concerning the corporation, and the contract specifically so provided.
- 14. At the closing of the transaction in December 1967, a representative of Lybrand produced a balance sheet for LMC. Although a formal certification by Lybrand had not been delivered at that time, the yorand representative promised the parties that Lybrand's audit was concluded and that it would in time certify the accuracy of all of the figures in the balance sheet it had produced, except for the accuracy of valuation of inventory (which is not involved in this action).
- 15. In cannot be over-emphasized that in entering upon this transaction both the buyer and the seller specifically relied upon the accuracy of Lybrand's audit, and neither had any information indicating that the audit was incorrect in any respect.
- 16. As a further part of the transaction, Samuel Levitt agreed to enter into a sales representative agreement with the company he had sold. The agreement was made and assigned to a new corporation, Dynamark, owned and controlled by the Levitts.
- 17. The purchaser, Poloron-New York, changed the name of the company it had acquired from LMC to Poloron-Indiana.
 - 18. During the months following the closing of the

transaction, plaintiff Poloron-New York had its own auditors, the firm of Touche, Ross, Bailey and Smart, audit the books and records of its newly acquired subsidiary, Poloron-Indiana. To the dismay of everyone, the Touche, Ross audit disclosed liabilities which the Lybrand audit had failed to unlover, and further disclosed the fact that the Lybrand audit had overstated assets. These differences amounted to a diminution in the value of the acquired corporation of approximately \$220,000 less than the corporate value fixed by Lybrand.

- 19. Poloron-New York assumed all of these liabilities, and paid them. It had therefore acquired an insolvent corporation which it brought to solvency only by the influx of its own capital.
- 20. In accordance with the acquisition agreements, Poloron-Indiana thereupon exercised its rights to withhold funds from the Levitts (now doing business through the corporate entity, Dynamark), which would otherwise have been due under the sales representative agreement.
- In May 1970, Dynamark brought an action against Poloron-Indiana in the United States District Court for the Northern District of Indiana seeking the commissions which had been withheld. Dynamark was represented by third-party defendant George Feiwell, Esq., the Chicago attorney who had represented the Levitts throughout the transactions. Poloron-Indiana was represented by Messrs.

 Botein, Hays, Sklar & Hartzberg, who continue to represent it to this day in the present action.
- 22. After the action had been commenced, it became evident that the real culprit was the Lybrand accounting firm

since whatever losses anyone had sustained was the result of their having relied upon Lybrand's grossly insufficient audit. Accordingly, in September 1970, the plaintiff in Indiana, Dynamark, obtained an order permitting the amendment of its complaint to include Lybrand as a defendant.

- 23. Lybrand would now have this Court believe that it has always been interested in litigating this controversy on the merits and has been frustrated in its efforts. The contrary has been revealed in its actions. After doing little more than answering the complaint in Indiana, Lybrand sought and obtained an order from the District Court in Indiana severing that portion of the action alleged against it.
- Court. Plaintiff moved to amend its complaint to conform with facts it had learned in discovery proceedings, and defendant, Poloron-Indiana, moved to transfer the action to the United States District Court for the Southern District of New York. The latter motion was granted and the case was transferred in November 1970. The Court did not rule upon the motion to amend the complaint.
- 25. In New York, the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil, was then retained by the plaintiff, Dynamark, to represent it in the further prosecution of this action in New York, the district to which the case had been transferred over its opposition.
- D. Brown, President of Poloron-New York (the defendant in that action), and Samuel Levitt (the principal figure among the plaintiffs in that action), entered into an agreement of settlement.

In had now become clear that neither Poloron-New York, Poloron-Indiana, Dynamark, or the Levitts should be held liable for the losses which had been realized by the parties as a result of the false financial statements, prepared solely by Lybrand, upon which everyone relied. The parties agreed that the then pending litigation would be terminated and that all of their respective rights would be assigned to a single party, Poloron-New York, which would pursue the action against the only real wrongdoer, Lybrand. The settlement agreement provided that 75% of any ultimate recovery as against Lybrand would belong to Dynamark, the party which had borne most of the losses by virtue of not having been paid on the sales representative agreement. A stipulation of discontinuance, without prejudice, was signed by all parties in June 1971.

- the assignee of all rights against Lybrand, the present plaintiff, Poloron-New York filed a complaint against Lybrand in the United States District Court for the Northern District of Illinois, in virtually the same form as the present complaint. George Feiwell, Esq. undertook this action on behalf of Poloron-New York. Lybrand contends that Mr. Feiwell is guilty of some kind of conspiratorial wrongdoing in now representing Poloron-New York, when he had previously represented Dynamark and the Levitts. But at this point, by virtue of the settlement in New York, and the parties' recognition that the only real wrongdoer was Lybrand, there was no further conflict.
- 28. At the time of the filing of the action in Illinois George Feiwell and Poloron-New York had every intention of carrying the case forward to a conclusion in that court.

- 29. In January 1972, however, shortly after the action was filed, the United States Court of Appeals for the Seventh Circuit decided the case of Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972). That decision changed existing law in the Seventh Circuit concerning the statute of limitations for actions brought under Section 10(b) of the Securities and Exchange Act of 1934, the section under which this case is brought. Prior to this decision, it had been the rule in the Seventh Circuit that the five year Illinois statute of limitations governing fraud actions applied to Section 10(b) actions. In Parrent, however, the Court decided, for the first time, that the applicable statute of limitations was the three year Illinois securities law statute.
- 30. Upon learning of this decision, which would have terminated plaintiff's rights against Lybrand in the Seventh Circuit, plaintiff filed a notice of dismissal of the action under Rule 41(2)(1)(i), Fed. R. Civ. P., which permits such voluntary dismissal, without prejudice, before the filing of a responsive pleading.
- 31. Thereupon, the present action was commenced by the same plaintiff, Poloron-New York, in this Court, where the applicable statute of limitations is six years. The complaint is a standard suit by a purchaser of a business against an accounting firm based on Rule 10b-5 for miscondent in preparing the overstated financial statements upon which the plaintiff relied in making its purchase.
- 32. Again, contrary to its assertion that it had always sought a determination of this controversy on the merits, Lybrand's actions bely its words. Rather than answer the

complaint and defend the action on the merits, Lybrand has engaged in a course of procedural motion practice obviously designed to avoid or delay adjudication of this controversy. Moreover, its course of conduct seems clearly to be directed toward driving a wedge among all the other parties to the transactions so that they will litigate against each other and hopefully forget about the real wrongdoer, Lybrand.

- 33. In furtherance of this course of conduct, instead of answering the complaint, Lybrand moved to strike it as sham and false, for an order precluding George Feiwell, Esq. from participating in the case, and even for disciplinary action against Mr. Feiwell. The alleged basis for this scandalous motion is revealing as to Lybrand's true motives. The sole alleged basis for the contention that the complaint was "sham and false" is the allegation that a certified balance sheet was delivered by Lybrand at the closing. The complaint did allege this fact, and it is technically incorrect. As I have indicated, the balance sheet actually produced at the closing was uncertified, but the Lybrand representative assured the parties that it was accurate and that, with the exception of inventory valuations, a certification of it would be delivered to the parties. In fact, after the closing, a balance sheet certified in accordance with Lybrand's promise, and containing the precise figures set forth in the balance sheet delivered at the closing, was delivered by Lybrand.
- 34. Needless to say, the Court denied this baseless motion in all respects.
- 35. The next procedural step followed by Lybrand, almost incredibly, was to move for reargument of that motion. Judge

Stewart quite obviously adhered to his earlier decision.

- 36. Still attempting to drive a wedge among the other parties and to avoid the real action in which it faces liabilities of approximately \$220,000, Lybrand has now filed two counterclaims against Poloron-New York, and a third-party complaint alleging two claims against Poloron-Indiana, Samuel Levitt, Carl Levitt, Jay Levitt, Dynamark and George Feiwell.
- 37. In the first counterclaim and the second claim contained in the third-party complaint, Lybrand attempts to allege a cause of action for malicious prosecution, combined in some manner or another with allegations of fraud and securities law violations. The damages sought are expenses of defending the various litigations which I have described herein, and nothing more.
- 38. For the reasons set forth herein, there is no factual basis for any of these assertions. For the reasons set forth in the accompanying memorandum of law, there is no legal basis for them either.
- 39. The second counterclaim asserted against Poloron-New York is clearly insufficient on its face, and should also be dismissed. That claim is an action on an account stated against Poloron-New York in the amount of \$4,830, according to an account annexed as Exhibit D to the complaint. The Court's attention is directed to that Exhibit D (copy attached mereto). That exhibit is a bill rendered to Poloron-Indiana, not Poloron-New York. Accordingly, the second counterclaim asserted against Poloron-New York must also be dismissed.
- 40. The first claim set forth in the third party complaint does not seek affirmative relief; rather it asks for

indemnification against any damage collected against Lybrand in the action. That counterclaim cannot be dismissed on its face. It, like the eleven affirmative defenses alleged in the answer to the complaint are clearly interposed as party of Lybrand's scheme to force all the other parties other than Lybrand to liticate against each other. It is expected that after discovery is concluded, a motion will be made seeking dismissal of this indemnification counterclaim and many of the baseless affirmative defenses. Only then, will plaintiff be able to conduct a trial before this Court involving the real issues presented against the real defendant — Lybrand.

41. For all of the foregoing reasons, it is respectfully requested that the within motion be granted in all respects.

Matrill Esses

Sworn to before me this 20th day of September, 1974.

> Noticy Public Store of New Took No. 31-4500-41, Oct. 16 H. Z. Co.

EXHIBIT D TO GOLD AFFIDAVIT SWORN TO SEPTEMBER 20, 1974

STATE OF ILLINOIS)
COUNTY OF C O O K

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AFFIDAVIT

GEORGE S. FEIWELL, being duly sworn, deposes and states:

- 1. I am a member of the firm of FEIWELL & GALPER, a member of the Bar of the State of Illinois since 1953, and counsel for plaintiff Poloron Products, Inc. ("Poloron") in this litigation. I make this affidavit in opposition to the motion of Lybrand Ross Bros. and Montgomery (Lybrand) to strike the complaint herein and for other relief.
- 2. In October, 1967, and for some time prior thereto, I was retained by Levitt Manufacturing Corp., Samuel Levitt, Carl Levitt, and Jay Levitt, shareholders thereof, to represent them in the sale by the Levitt's and one Jack Whitney, of all of the stock of Levitt Manufacturing Corp., to Poloron. In connection with said sale, and at the request of both the sellers and the purchaser, Lybrand was retained to conduct an audit of the books and records of Levitt Manufacturing Corp. as of September 30, 1967. Said corporation was at that time, and for some time prior thereto, in financial difficulties, and knowledge of the precise financial condition of the corporation was essential to the consummation of the aforesaid sale. The closing date of December 1, 1967, was selected for the express reason, among others, that Lybrand would, by that date, have completed the then pending audit of Levitt Manufacturing Corp., so that the closing could thus proceed upon the basis of the figures reported in said audit.

3. That either on December 1, 1967, or a few days prior thereto, a meeting occurred at the offices of Botein, Hays, Sklar & Herzberg in New York City, who were counsel for Poloron Products, Inc. Present at that meeting were Joseph Brown, Merahem Jacobi, Nathaniel Whitehorn, Howard Weinreich, either Messrs. Jenkins and/or Sharp, Samuel Levitt, Carl Levitt, Sidney Nobel, a certified public accountant, from time to time employed by the Levitts, and your affiant. At that meeting, the question of certification of inventory valuation of Levitt Manufacturing Corp. was discussed and it was agreed between the parties that said inventory would be written down by \$50,000.00. The representatives from Lybrand Ross Bros. and Montgomery, either at that neeting, or previously, had advised the parties that they would not certify the valuation of the inventory. The understanding with reference to the write down of the valuation of the inventory was reduced to writing and said agreement was executed at the closing.

Substantial discussions also took place concerning the allowance for Levitt Manufacturing Corp.'s doubtful accounts, which allowance had been set up by Lybrand. An agreement to recompute the allowance based on collections, was ultimately effected between the parties and incorporated in a letter agreement which is attached as Exhibit 2 in the affidavit of Powell Pierpoint. At this time, either Messrs. Jenkins or Sharp of Lybrand, represented that Lybrand would certify the balance sheet of Levitt Manufacturing Corp. except for the valuation of the inventory.

. In my capacity as counsel for the selling shareholders and for Levitt Manufacturing Corp., I was present on December 1, 1967, at the offices of Botein, Hays, Sklar & Herzberg, in New York City. Also present were Joseph D. Brown, President of Poloron, Menahem Jacobi, Secretary-Treasurer of Poloron, Nathaniel Whitehorn and Howard Weinreich, members of the firm of Botein, Hays. Sklar & Herzberg, counsel for Poloron, Samuel Levitt. Carl Levitt. Jay Levitt, and representatives on behalf of Lybrand. At said closing Lybrand presented a balance sheet which was expressly represented as the product of its audit of the books and records of Levitt Manufacturing Corp., as of September 30, 1967. Messrs. Jenkins and Sharp, on behalf of Lybrand, stated that the figures presented in said balance sheet would be certified by Lybrand. Either Mr. Jenkins or Mr. Sharp stated that the certificate would be unqualified, except for the valuation of inventory in connection with which Lybrand had encountered certain difficulties. Prior to, and again at the closing, Lybrand was advised by both Samuel Levitt. on behalf of the sellers, and either Joseph D. Brown, or Menahem Jacobi, on behalf of the purchaser, that the parties would rely on the audit report prepared by Lirand, in consummating the transaction.

- 4. Lybrand's final audit report is dated November 20, 1967. Said audit report contains a balance sheet which was and is identical in every respect to the balance sheet submitted to the sellers and the purchaser at the closing, and which I examined at said closing. Included in said audit report was, as had been promised, a certificate of Lybrand, unqualified in every respect, save one: the valuation of inventory.
 - 5. During the ensuing months, Poloron directed its own

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EXHIBIT D TO GOLD AFFIDAVIT

auditors, the firm of Touche, Ross, Bailey and Smart, to audit the books and records of Levitt Manufacturing Corp., (the name of which had then been changed to Poloron Products of Indiana, Inc.) The audit reports of Touche, Ross and Company (the name of this firm also was subsequently changed) disclosed a substantial amount of liabilities as of September 30, 1967, which had not been reported by Lybrand in its audit report as of said date. In view of the close working relationship between the sellers and Poloron, arising out of a Sales Representative's Agreement between Poloron of Indiana and Samuel Levitt, executed simultaneously with the closing of the sale transaction, my clients and Poloron made sincere efforts, over a period of more than two years, to compromise the claims of Poloron against my clients arising from Touche, Ross' report of undisclosed liabilities as at September 30, 1967. Approximately contemporaneous with the termination of the Sales Representative's Agreement (which at that time had been assigned by Samuel Levitt to Dynamark Corp., his controlled corporation), the controversy engendered by the undisclosed liabilities reported by Touche, Ross, resulted in litigation. My client, Dynamark, brought suit against Poloron Products of Indiana, Inc. to recover sales commissions earned by Dynamark, but withheld by Poloron of Indiana as a set-off against the aforesaid undisclosed liabilities, and Poloron counterclaimed against the Levitt's under the indemnification provisions of the Sales Agreement. This action was commenced in the United States District Court for the Northern District of Indiana. Lybrand was one of the named defendants.

5. Subsequent to the filing of said action, the defendant Lybrand, successfully moved for a severance and separate trial of the claims against it, and accordingly said claims were held entirely in abeyance. Shortly thereafter, Poloron successfully moved under

28 U.S.C. \$1404(a) for transfer to the Southern District of New York. Prior to said transfer, the plaintiff, Dynamark, had sought leave of court to add as additional parties plaintiff, Samuel Levitt. Carl Levitt and Jay Levitt, the selling shareholders and as an additional party defendant, Poloron Products, Inc., the purchaser. This motion was never ruled upon by the District Court in Indiana.

7. After the aforesaid Transfer, my clients employed the firm of Rosenman, Colin, Kaye, Petschek, Freund and Emil to represent them in the Southern District of New York and Gerald Walpin, a member of said firm, thereupon took over the prosecution of the litigation. Shortly thereafter, Messrs. Rosenman, Colin, Kaye, et al, obtained leave of this court to file an amended complaint, copy of which appears attached to the affidavit of Powell Pierpoint, as Exhibit "C" thereto. Said amended complaint restated the claim of Samuel Levitt, Carl Lovitt, Jay Levitt and Dynamark against Lybrand and added new claims against Poloron Products, Inc. The allegation in said complaint that, at the closing on December 1, 1967, Lybrand delivered a certified balance sheet to the parties, was based on my memory and those of my clients, buttressed by the fact that the copy of Lybrand's certified audit, dated November 20, 1957, then in our possession, contained figures which were identical to those contained in certain closing documents (letter supplements to the Agreement of Sale) and to those remembered distinctly by Samuel Levitt, who had engaged in a vociferous and lengthy negotiation at the closing, or shortly prior thereto, with Joseph D. Brown, President of Poloron, respecting these figures. I and Samuel Levitt both recalled the initialling of said balance sheet, but neither of us recalled precisely what it looked like. I believe that Messrs. Jenkins and/or Sharp, the representatives of Lybrand, retained in

their possession whatever balance sheet they exhibited to the parties. Neither my clients nor I, at any time had rossession of said balance sheet, nor did we then, nor do we now, possess a copy of the sheet initialled by the parties at the closing. The handwritten draft of the balance sheet which Mr. Powell Pierpoint attached as Exhibit "A" to his affidavit, does not contain the initials of Messrs. Levitt and Brown, or anyone else, for that matter, and I have no personal knowledge as to whether what is attached as Exhibit "A" to Mr. Powell Pierpoint's affidavit, is what it purports to be. I participated in conferences between Gerald Walpin and Samuel Levitt, and it was pursuant to said conferences that Gerald Walpin executed and filed the amended complaint in the Southern District of New York, making the allegation that a certified balance sheet was presented by Lybrand at the closing. That allegation was made in good faith by my client, by me, and by Gerald Walpin, and to this day I have seen no evidence or sworn testimony of any person, with personal knowledge of the events of December 1, 1967, which contradicts this belief. Indeed, at his deposition in New York City, taken on January 18, 1973, Joseph D. Brown, President of Poloron Products, Inc., testified under oath that he then and row believes, that he was shown a certified balance sheet at, or prior to the closing on December 1, 1967. Mr. Brown adhered to this testimony, despite the most vigorous interrogation by Mr. Pierpoint.

8. It is undisputed that, at the aforesaid closing, Lybrand presented a balance sheet of Levitt Manufacturing Corp., as of September 30, 1967. It is undisputed that said balance sheet was the product of an audit conducted by Lybrand. It is undisputed that, at said closing, Lybrand represented that it would certify the balance

sheet it had then presented. It is undisputed that both the buyers and sellers relied on said balance sheet at the closing. It is undisputed that the balance sheet contained in the typed audit report subsequently delivered by Lybrand was, in all material respects, identical with the balance sheet which Lybrand presented at the closing. Accordingly, whether the balance sheet submitted by Lybrand at the closing was typed or handwritten, or certified or uncertified, is irrelevant. The balance sheet ultimately delivered by Lybrand, subsequent to the closing, is the balance sheet delivered by Lybrand at the closing. Its physical form at either time is immaterial.

9. After a period of vigorous litigation, Joseph D. Brown, President of Poloron Products, Inc., and Samuel Levitt, the principal figure among the plaintiffs, conducted settlement negotiations out of the presence of their respective attorneys. Ultimately, Messrs. Brown and Levitt, agreed to terminate the litigation upon terms acceptable to both of them. For reasons set forth in the affidavit of Samuel Levitt, which is filed in connection herewith, Poloron agreed, as an integral part of the settlement, to commence litigation against Lybrand and to assign to Dynamark Corp. 75% of the recovery, if any, therefrom. An essential pre-condition laid down by Poloron was that the attorney engaged to represent it in its suit against Lybrand agree to prosecute the litigation on a contingent fee basis and that Samuel Levitt and Dynamark undertake to obtain such counsel for Poloron. Samuel Levitt reported to me the details of his meeting with Joseph D. Brown and expressly requested me to act as counsel for Poloron and to conduct the litigation on a contingent fee basis. Although my representation of the Levitts and Dynamark had always theretofor been upon the basis of hourly fees, I reluctantly agreed

to depart from my prior custom and conduct this matter on a contingent fee basis. In this respect, my decision was influenced by the fact that the prosecution of this litigation by Poloron, and its assignment of 75% of the proceeds to Dynamark, were essential elements of the settlement agreement.

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- 10. Pursuant to the foregoing, I was retained by Poloron and on its behalf I instituted suit against Lybrand in the Northern District of Illinois. Upon the same understanding of the facts set forth above, the complaint alleged that Lybrand had delivered a certified balance sheet of Levitt Manufacturing Corp. at the closing on December 1, 1967, and that Poloron had relied on said balance sheet. This was the explicit understanding of the President of Poloron, whose signature appears on this complaint. Mr. Brown, then, and now believes, as set forth in his deposition transcript, that the balance sheet which he relied on at the closing, was certified. Pursuant to Rule 11 of the Federal Rules of Civil Procedure, my name was affixed to the complaint, although I did not actually sign it - a fact over which Mr. Pierpoint makes much ado. This is a common practice in the Northern District of Illinois, in instances wherein the client rather than the attorney affixes his personal signature to a complaint.
- 11. In January, 1972, the Court of Appeals for the Seventh Circuit, handed down a decision in the case of Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972), which literally repealed the pre-existing statute of limitations for actions brought under Section 10(b) of the Securities Exchange Act of 1934, in the Seventh Circuit. Prior to this decision, it had been the rule in that Circuit that the applicable statute of limitations was the statute of limitations governing actions for fraud in the forum state; that is, in Illinois, the five-year statute for actions

sounding in fraud. In Parrent, the Court of Appeals decided for the first time that the applicable statute of limitations was the three-year statute of limitations provided in the Illinois Securities Law, and that the U.S. District Court sitting in the forum state, was bound to apply that three-year statute.

- 12. Upon learning of the decision of the Court of Appeals for the Seventh Circuit in the Parrent case, I immediately voluntarily dismissed the litigation in the Northern District of Illinois, by filing a Notice of Dismissal under Rule 41(a)(1)(i). If I had not done so, the interests of my clients would have been jeopardized, since the cause of action arose more than four lears prior to the date of filing of the litigation in the Northern District of Illinois. My professional duty under these circumstances was clear.
- 13. The present complaint was filed in this court some months thereafter, again alleging the facts which my client and I firmly believed to be true; that Lybrand delivered a certified balance sheet of Levitt Manufacturing Corp. and that the principals of Poloron and of Levitt Manufacturing Corp. relied thereon at the closing. In this complaint, as in the prior complaint filed by Gerald Walpin on behalf of the Levitts, it was alleged that Lybrand had violated Sec. 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)5 thereunder. These statutory and regulatory provisions speak unambiguously of fraud; but, in my opinion, at the time said complaints were prepared and at present, said statutory and regulatory provisions apply to negligent and careless conduct of an auditor in connection with the purchase and sale of securities, so as to constitute constructive fraud under said law and Rule. Eschott v. Bar-Chris Constr. Co., 283 F. Supp. 643 (S.D.N.Y. 1968);

also Ellis v. Carter, 291 F.2d (9th Cir. 1961. In drafting the

foregoing pleading counsel relied on this authority. No charge of common law fraud and deliberate deception was intended; the aforesaid cases do not require that such fraud either be alleged or proven in order to merit recovery.

14. At the deposition of Joseph D. Brown on January 18, 1973, I stated upon the record that:

"It is not the contention of the plaintiff for this record that Lybrand at that time knew and deliberately and wilfully did not disclose, nor have we so contended, sir" (see Exhibit "G" to the Pierpoint affidavit herein).

That statement was made in reliance on the judicial decisions cited above. Whether or not Lybrand had knowledge of the undisclosed liabilities existing as of September 30, 150 and later discovered by the audits of Touche, Ross & Co., but deliberately failed to disclose such liabilities, is legally irrelevant in light of the foregoing precedents. Neither I nor my client possess personal knowledge of such deliberate fraud. My statement upon the record of the Brown deposition, is therefore totally consistent with the allegations in the complaint, and with the existing interpretations of the law respecting the capacity of accountants to be held responsible for constructive fraud under the provisions of Sec.10(b) of the Securities Exchange Act of 1934.

15. After the adjournment of the Brown deposition, and after Mr. Brown consistently refused to alter his testimony respecting the delivery of a certified balance sheet at the obsing, Mr. Pierpoint and I discussed whether or not the balance sheet delivered at the closing, was in fact certified. The words which Mr. Pierpoint puts in my wouth (Par. 22, Pg. 3 of his affidavit) were

never uttered by me. Possibly, he imagined them. In the spirit of expediting the litigation, the sum and substance of what I said was merely that, if after a thorough investigation of the files and the memories of my clients, I could verify Mr. Pierpoint's stubborn, but as yet utterly unverified assertion, that the balance sheet delivered at the closing, was uncertified, I would be happy to amend the complaint.

16. In the rineteen years that I have been privileged to practice before the Courts of the State of Illinois and of the United States, I have never before been confronted with a pleading and affidavit attacking my ethics and professional conduct. At no time prior to the filing of the motion and affidavit under Rule 11 by Mr. Powell Pierpoint, did Mr. Pierpoint ever afford me the courtesy of discussing the factual and other issues raised in his affidavit.

While I am certain Mr. Pierpoint is surely zealous, he has been less than diligent in ferreting out the history of this litigation and my role in relation thereto.

FURTHER AFFIANT SAYETH NOT.

George S. Feiwell

Subscribed and Sworn to before me this 8th day of March, 1973.

Charlette Street

AFFIDAVIT OF POWELL PIERPOINT SWORN TO NOVEMBER 4, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff,

- against -

72 Civ. 3884 · (W. C. C.)

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff,

: AFFIDAVIT IN SUPPORT OF : MOTION TO DISMISS, FOR : SUMMARY JUDG-

MENT, AND FOR.

- against -

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYMAMARK CORPORATION AND GEORGE FEINELL, :

: AN AWARD OF REASONABLE : ATTORNEYS' FEES

Third-Party Defendants.

COUNTY OF NEW YORK)

FOWELL PIERPOINT, being duly sworn, deposes and says:

- 1. I am a member of the firm of Hughes Hubbard & Reed, attorneys for defendant and third-party plaintiff Coopers & Lybrand ("Lybrand"), am a member of the Bar of this Court, and I am familiar with the facts and proceedings herein.
- I make this affidavit in support of Lybrand's motion for an order:
 - (a) Pursuant to Fed. R. Civ. P. 12(b)(6) dismissing the amended complaint on the ground of res judicata and for failure to state a claim upon which relief can be granted;
 - (b) Pursuant to Fed. R. Civ. P. 56 granting summary judgment for Lybrand with respect to the amended complaint;

- (c) Awarding Lybrand its reasonable attorneys' fees; and
- (d) Granting such other, further and different relief as to the Court may seem just and proper.
- I. THE MOTION FOR SUMMARY JUDGMENT
- 3. The amended complaint purports to allege a violation by Lybrand of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Lybrand has moved for dismissal under Rule 12(b)(6) on the ground of res judicata and for failure to state a claim upon which relief can be granted. In addition, Lybrand is entitled to summary judgment because there can be no genuine issue as to the material facts which establish that:
 - (a) In purchasing the stock of Levitt Manufacturing Corporation ("LMC") plaintiff Poloron Products, Inc. ("Poloron") did not rely upon any representation by Lybrand as to the extent of the deficit net worth of LMC; and
 - (b) Poloron paid only \$11,200 for the LMC stock and has suffered no damage.

The facts establishing each of these bases for granting judgment to Lybrand as a matter of law are set forth below and are succinctly restated pursuant to Rule 9(g) of the General Rules of this Court in a separate statement annexed to the Notice of Motion.

A. In Purchasing The LMC Stock, Poloron Did Not Rely Upon Any Representation by Lybrand As To The Extent Of The Deficit Net Worth Of LMC

Poloron Relied On Its Right To Be Indemnified By The Levitts For Any Undisclosed Liabilities Of LMC.

4. In October, 1970, Poloron served a Verified Complaint which commenced an action in the Supreme Court of the

State of New York against Samuel, Carl and Jay Levitt (the "Levitts"), from whom it had purchased the LMC stock. A certified copy of this Verified Complaint is annexed hereto as Exhibit A ("Pierpoint Aff., Ex. A"). In the Verified Complaint, Poloron stated that it had purchased the LMC stock in reliance upon the representations and warranties which the Levitts had made with respect to the net worth of LMC, and demanded judgment against the Levitts for the same allegedly undisclosed liabilities of LMC which Poloron seeks to recover from Lybrand in the present action. Poloron stated that:

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- (a) The Levitts had warranted that the balance sheet of LMC as of August 31, 1967 reflected all liabilities of LMC and that it occurately presented LMC's financial condition, (Pierpoint Aff., Ex. A, § 4(b)(i));
- (b) The Levitts had warranted that the deficit net worth of LaC on September 30, 1967 which would be shown on a balance sheet to be prepared by Lybrana would not exceed \$75,680.

 (Pierpoint Aft., Ex. A, § 4(b)(ii));
- (c) The Levitte agreed to indemnify Poloron for any liabilities or claims against LMC which existed on September 30, 1567 but which were not reflected in the September 30, 1567 balance sheet, (Pierpoint Aff., Ex. A, § 4(c));
- (d) As to any liabilities or claims against LMC which were not reflected in the September 30,

1967 balance sheet, Poloron could invoke its right to indemnity by withholding from the Levitts Poloron common stock due under the Purchase Agreement and by withholding sales commission otherwise due them, (Pierpoint Aff., Ex. A, § 5).

- 5. Poloron's chief executive officer swore in the Verified Complaint that based on his personal knowledge, Poloron had "relied upon the warranties above described * * * in consummating the Purchase Agreement." (Pierpoint Aff., Ex. A, ¶ 6).

 Poloron Did Not Rely On The Tentative Balance Sheet At The Closing
- 6. At the closing of the Purchase Agreement on December 1, 1967 (the "Closing Date"), the parties requested and received from Lybran3 a tentative balance Sheet of LNC as of September 30, 1967, in handwritten form, marked "Draft 12/1/67." (Sharp 3/23/73 Aff., 1 6; Jenkins 3/23/73 Aff.) A true copy of the tentative balance sheet is annexed to Lybrand's Answer and Counterclaims as Exhibit A.
- 7. The tentative balance sheet showed LMC as being insolvent, with a deficit net worth of \$316,546.29.
- 8. At the closing Poloron knew that Lybrand would not certify the inventory or related accounts of LMC as of September 30, 1967, and that Lybrand had not decided what other accounts, if any, it would be able to certify. (Sharp 3/23/73 Aff., 5 &; Jenkins 3/23/73 Aff.)

References to the "Sharp 3/23/73 Aff." and the "Jenkins 3/23/73 Aff." are to the affidavits of Joseph D. Sharp and Daniel R. Jenkins, respectively, submitted to this Court on March 27, 1973 in support of Lybrand's motion to impose sanctions under Fed. R. Civ. P. Rule 11.

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AFFIDAVIT OF POWELL PIERPOINT

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- 9. At the closing, Poloron and the Levitts entered into a letter agreement (the "Letter Agreement"), a copy of which is . nexed Lereto as Exhibit B ("Pierpoint Aff., Ex. B").
- 10. In the Letter Agreement, Poloron and the Levitts stated:

"Lybrand, Ross & Montgomery has this day delivered to us a tentative balance sheet of Levitt as of September 30, 1967 * * *." (Pierpoint Aff., Ex. B, 11).

Poloron and the Levitts acknowledged that the deficit net worth shown on the tentative balance sheet was

"subject to any corrections that Lybrand, Ross and Montgomery may make * * *." (Pier-point Aff., Ex. B, § 1).

- 11. Poloron and the Levitts also agreed between themselves that the value of inventory shown on the tentative balance sheet should be reduced by \$50,000. (Pierpoint Aff., Ex. B, 7 1). The tentative deficit net worth was thus increased to \$366,546.29, still subject, of course, to further possible adjustment.
- 12. Poloron also indicated that it specifically would not rely on the September 3), 1967 balance sheet to disclose all of LMC's current liabilities to trade creditors as of September 30, 1967. The Levitts and Poloron thus agreed that the deficit net worth of LMC would be further increased by the amount of any such liabilities discovered by Poloron during the following year. (Pierpoint Aff., Ex. B, § 3).

Poloron Would Not Have Closed The Purchase Agreement If The Levitts Had Not Promised To Indemnify It For Further Deficiencies In The Net Worth Of LNC.

13. In Paragraph 7A of the Purchase Agreement²,
Poloron was given the right of refusing to close if the figures

What about

The Purchase Agreement is annexed to the amerded complaint as Exhibit 1.

shown on the September 30, 1967 balance sheet reduced the net worth of LMC by more than \$400,000 below the \$124,120 net worth shown on the August 31, 1967 balance sheet. In other words, the contract gave Poloron the option of refusing to close if the September 30, 1967 balance sheet showed LMC's deficit to be more than \$275,880.

14. As set forth above, the Levitts conceded to Poloron at the closing that the deficit as of September 30, 1967 was at least \$266,546.29, and agreed that even this figure was subject to further adjustment. In the affidavit of M. M. Jacobi, Poloron's chief financial officer, dated June 18, 1970, a copy of which is innexed hereto as Exhibit C ("Pierpoint Aff., Ex. C"), Mr. Jacobi testified:

"Not only did Levitt Manufacturing have a not live net worth as of September 30, 1967, for in excess of \$75,880 but such excess dericiency was apparent on December 1, 1967 * * *. The parties to the Purchase Agreement conceded in writing that the deficit net worth of Levitt Manufacturing was \$366,546.29 subject to further possible adjustment as provided in the Letter Agreement of December 1, 1967 * * *." (Pierpoint Aff., Ex. C, ¶ 5).

15. As set forth in Paragraph 13 above, Poloron could have refused to close since it knew that LMC had a deficit net worth substantially in excess of \$275,880. None-tneless, Poloron waived this option and proceeded to acquire the LMC stock.

16. The Jacobi affidavit, however, expressly states:

"Paragraph 19 of the Purchase Agreement was careful to point out that the closing under the Purchase Agreement would not be deemed a waiver of Poloron's right to be reimbursed for the amount by which the deficit net worth of Levitt Manufacturing as at September 30, 1967 exceeded the maximum permissable deficit of \$75,680." (Pierpoint Aff., Ex. C, § 6).

- 17. Indeed, Mr. Jacobi has testified that in consummating the Purchase Agreement on the Closing Date, the only
 discussion with respect to unrecorded liabilities which he
 recalls was that the Levitts had the responsibility "for
 assuming the obligation for unrecorded liabilities." (Jacobi
 Deposition, October 14, 1970, p. 31). A copy of this portion of Mr. Jacobi's testimony is annexed hereto as Exhibit
 D ("Pierpoint Aff., Ex. D").
- B. Poloron Paid Only \$11,200 For The LMC Stock And
 Has Suffered No Damage
 The LMC Stock Is Wor'h What Poloron Paid For It.
- 18. Mr. Jacobi has testified that apart from the \$11,200 paid to the Levitts at the Closing, Poloron has contributed "not one dime" to LHC. (Jacobi Deposition, October 14, 1970, p. 47). A copy of this portion of Hr. Jacobi's testimony is annexed hereto as Exhibit E ("Pierpoint Aff.,

Ex. E").

19. Poloron's former President, Joseph Brown, recently revealed at his deposition that Poloron is planning to sell the LMC stock. Although he refused to specify the expected selling price, he expressed confidence that Poloron will receive at least what it paid the Levitts. (Joseph Brown Deposition, April 24, 1974, p. 146). A copy of this portion of Mr. Brown's testimony is annexed hereto as Exhibit P ("Pierpoint Aff., Ex. F").

Poloron Has Nore Than Recouped Its Purchase Price From The Levitts And The Operations Of LNC Have Been Profitable

20. As of June 18, 1970, Poloron had withheld from the Levitts the sum of \$160,000 in sales commissions, (Pierpoint Aff., Ex. C, § 9) plus \$24,355 in Poloron common stock (Pierpoint Aff., Ex. C, § 10).

- 21. By October, 1970, Poloron had recovered \$235,000 in sales commissions and \$69,944 in Poloron common stock (Pierpoint Aff., Ex. A, ¶ 9), or a total of \$304,944.
- 22. In addition, LMC had earnings of \$228,000 in 1969 and earnings of \$200,000 for the first nine months of 1970 (Pierpoint Aff., Ex. C, ¶ 12).
- 23. Further sales commissions and common stock may have been withheld by Poloron, and LMC may have had additional earnings, but the extent thereof is not presently known to Lybrand.
- 24. Poloron has thus already recouped far more than it paid for the LNC stock, and has no claim for damages against Lybrand.
- 25. Indeed, as set forth in an agreement between the Levitts and Poloron dated June 25, 1971, annexed hereto as Exhibit G ("Pierpoint Aff., Ex. G"), Poloron has promised to give the Levitts 75% of anything it recovers by virtue of its suit against Lybrand (Pierpoint Aff., Ex. G, ¶ 3).
 - II. THE TWO VOLUNTARY DISMISSALS OF THE SAME CLAIM AGAINST LYBRAND OPERATED AS AN ADJUDICATION ON THE MERITS UNDER RULE 41(a)(1)

The First Dismissal

26. In 1971, an action was pending before this Court in which the Levitts and Poloron were litigating their claims against each other arising out of Poloron's purchase of the LMC stock. In that action, the same claim was also pending against Lybrand as is now before the Court. On or about June 28, 1971, as Lybrand's attorney of record, I was informed that Poloron and the Levitts had reached a settlement. I was asked to execute a stipulation concenting to a voluntary dismissal under Rule 41(a) (1).

- 27. It was not disclosed to me or to anyone else representing Lybrand that Poloron had taken an assignment of the pending claim against Lybrand, nor was it disclosed that Poloron had committed itself to prosecute Lybrand on that purported claim. It was represented to me simply that Poloron and the Levitts had reached settlement and wished to terminate the litigation.
- 26. I executed the stipulation of dismissal in the reasonable belief that, barring new developments not then foreseen, this represented the end of litigation.

The Second Dismissal

- 29. On or about December 30, 1971, Poloron instituted an action on the same claim against Lybrand in the Northern District of Illinois.
- 30. Lybrand obtained an extension of time to respond to the complaint, engaged Chicago counsel and filed a notice for the depositions of two of Poloron's officers.
- 31. On February 9, 1972, Poloron filed a notice of Gismissal under Rule 41(a)(1). Under Rule 41(a)(1), this notice of dismissal operated as an adjudication on the merits.

WHEREFORE, Lybrand respectfully requests that its motion be in all respects granted.

Powell, Pierpoint

Sworn to before me this

4th day of November, 1974

Lotery public

EXHIBIT G TO PIERPOINT AFFIDAVIT SWORN TO NOVEMBER 4, 1974

June 25, 1971

Dynamark Corporation

Gentlemen:

This is to confirm our understanding with respect to the assertion of a claim by us against Lybrand Ross Bros. & Montgomery ("Lybrand") on account of the overstatement of the net worth of Levitt Manufacturing Corporation on the balance sheet as of September 30, 1967 prepared by Lybrand.

- 1. We have retained Messrs. Feiwell, Galper & Gordon on a contingent fee basis to institute suit against Lybrand on account of our claim against them as aforesaid. You have approved the choice of attorneys and the percentage and basis for the contingent fees. In the event that Messrs. Feiwell, Galper & Gordon shall fail or cease to act as our attorneys in the aforesaid suit against Lybrand, we shall, with your prior approval, use our best efforts to retain other attorneys on a contingent fee basis.
 - 2. You agree that you will pay 75% of all the

costs of the litigation, which costs shall include, without limitation, filing fees, deposition and hearing transcripts, Xeroxing expenses, transportation expenses and all other costs directly and specifically related to the conduct of such litigation.

- 3. We hereby agree to pay to you when and as received 75% of the net amount of any recovery (after deduction of legal fees and disbursements not theretofore paid) actually received by us or our subsidiary, Poloron Products of Indiana, Inc., on account of our claim against Lybrand.
- 4. If a counterclaim is asserted by Lybrand against us or if it should file a third party claim against our subsidiary Poloron Products of Indiana, Inc., you shall share with us the cost of defending such counterclaim or third party claim on the same basis as set forth above, that is 75% by you and 25% by us. You agree further to reimburse us in cash for 75% of the amount of any judgment that may be awarded against our subsidiary Poloron Products of Indiana, Inc. or against us in connection with the aforementioned litigation. You shall make payments of any amounts required of you herein promptly on demand. Nothing

herein contained shall obligate us to defend or contribute to the defense of any claim against you or your principals.

5. We shall instruct the attorneys retained by us in this matter to keep you advised of the progress of the litigation and of any settlement negotiations that may develop. Control over the conduct of the litigation shall be retained solely by us. We agree, however, at any time upon your written demand, to execute an assignment transferring our rights in and to our claims against Lybrand underlying such litigation to you, provided that (1) you shall simultanacusly reimburse us in full for any litigation expenses incurred to that time, (2) agree that you shall undertame to defray and pay all of the litigation expenses incurred subsequent to the assignment, and (3) execute an agreement to pay to us when and as received, 25% of the net amount of any recovery actually received by you on account of the claim assigned after deducting legal fees and disbursements. It is understood and agreed that your only recourse against us with respect to the conduct of the aforesaid litigation is to demand and receive an assignment of our claim as herein provided and provided such claim is so assigned, you shall have no other claim against us in connection therewith.

- 6. We shall under no circumstances assert the invalidity of this agreement as a defense to the payment of any money required by us to you under this agreement.
- 7. Irrespective of the amount of any recovery which we might obtain in the prosecution of our claim against Lybrand, and even if no recovery whatsoever is obtained by us, it is understood and agreed that neither we nor our subsidiary, Poloron Products of Indiana, Inc., shall have any further obligation of any kind whatsoever, including the payant of money, to you, Samuel Levitt, Carl Levit, or Jay Levitt, and the validity of the Settlement Agreement entered into of even date herewith shall be in no way affected and shall continue to operate in full force and effect forever thereafter.

Please indicate your acceptance of the terms hereof.
by signing a copy of this letter and returning it to us.

Very truly yours,

POLORON PRODUCTS, INC.

AGREED TO AND ACCEPTED
DYNAMARK CORPORATION

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AFFIDAVIT OF HARRIS J. AMHOWITZ SWORN TO NOVEMBER 4, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff.

72 Civ. 38 4 (W.C.C.)

-against-

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

> Defendant and Third-Party Plaintiff,

AFFIDAVIT

: A. IN OPPOSITION TO JOINT MOTION OF PLAINTIFF AND THIRD-PARTY DE-FENDANTS; AND

:

-against-

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNA-MARK CORPORATION AND GEORGE FEINELL,

> Third-Party Defendants.

: B. IN SUPPORT OF MOTION TO DISHISS AMENDED COMPLAINT, FOR SUMMARY JUDGMENT, AND FOR AN AWARD OF REA-SONABLE ATTORNEYS FEES

STATE OF NEW YORK : ss.: COUNTY OF NEW YORK)

HARRIS J. AMHOWITZ, being duly sworn, deposes and says:

- 1. I am General Counsel for defendant and thirdparty plaintiff, Coopers & Lybrand ("Lybrand"), a position I have held since July 1970, and I am a member of the Bar of this Court. I make this affidavit:
- (a) In opposition to the joint motion of plaintiff and third-party defendants to dismiss certain of the claims which Lybrand has asserted against them in the present litigation; and
- (b) In support of that portion of Lybrand's metion to dismiss the amended complaint and for summary judgment which seeks an award of its reasonable attorneys' fees.
- 2. My knowledge of the facts set forth herein is based upon my personal knowledge and involvement in the history ot this litigation, conversations with the individuals involved

in the underlying transaction, including the third-party defendants, and conversations with the opposing counsel who have been involved in the various suits against Lybrand.

3. As hereinafte se: forth, Lybrand has now been compelled by plaintiff and the third-party defendants to defend three lawsuits and five separate complaints on the same outrageously fabricated claim, and has been forced to expend sums in excess of \$40,000 for legal representation in the four forums where the suits have been located. The purported fraud claim involved in all of these suits has in fact been asserted solely as the result of a fraud perpetrated by the third-party defendants and a collusive agreement by plaintiff to harass Lybrand on their behalf.

The Transaction and the Fraud on Lybrand

- 4. On December 1, 1967, plaintiff Poloron Products, Inc. ("Poloron") purchased from third-party defendants Samuel, Carl and Jay Levitt (the "Levitts") all the outstanding stock of Levitt Manufacturing Corporation ("LMC"), a family company founded by the Levitts in 1964. Poloron paid a total of \$11,200 for the stock.
- 5. At the closing of the stock purchase agreement on December 1, 1967 (the "Closing Date"), Lybrand, the auditors for LMC, informed Poloron and the Levitts that it would not certify the inventory or related accounts of LMC as of the fiscal year ending September 30, 1967, and that it did not know yet whether it could certify any other accounts. A tentative handwritten draft of LMC's balance sheet as of September 30, 1967, showing a deficit net worth in excess of \$300,000, was left with Poloron and the Levitts. The parties agreed that the figures were tentative and subject to change.

- 6. With knowledge of the above, Poloron proceeds to close, paying the Levitts \$11,200 for the stock, and the Levitts promised to indemnify Poloron for any further increases in the LMC deficit as of September 30, 1967.
- 7. As a result of written representations (see Exhibit E to Lybrand's third-party complaint) and other representations made to Lybrand by the Levitts, and subsequent events hereinafter set forth, Lybrand has concluded that the Levitts perpetrated a fraud on it during the audit of their company in order to avoid the disclosure at closing of substantial liabilities which they had caused LMC to incur. Lybrand's investigation has disclosed that the Levitts apparently did this at least in part by withholding or removing all mention of certain creditors from LMC's books and records. The largest such item presently known is a \$45,000 debt to a Swiss bank resulting from a letter of credit transaction which the Levitts caused LMC to enter into while they were negotiating to sell their stock to Poloron. Because the Levitts withheld or removed all evidence of this debt from LMC's books and records, and because LMC had no other dealings with the bank, the debt was not reflected in the tentative balance sheet, and Lybrand still knew nothing of it when it reported the results of its audit examination several months after the closing. The Levitts had assured Lybrand in writing that all liabilities of LMC were reflected in the books and records which they presented to Lybrand for examination. The debt to the Swiss bank is particularly convincing evidence of traud since they expressly tole Lybrand that there were no outstanding letters of credit.
- 8. In addition, the lawyer who represented the Levitts and LMC throughout the negotiations with Poloron, third-party defendant George Feiwell, gave Lybrand a confirmation letter

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during the audit in which he assured Lybrand that as of September 30, 1967 there was no threatened or pending litigation against LMC. In 1968, however, Poloron informed Lybrand that two lawsuits against LMC for approximately \$29,000 should have been included as contingent liabilities as of September 30, 1967. Feiwell's letter had made no mention of these suits, and the Levitts had assured Lybrand that the Peiwell letter has correct. The debt to the Swiss bank and the two undisclosed lawsuits alone account for \$74,000, more than one-third of the liabilities of LMC which Poloron says it has discovered since buying the stock.

The Litgation

9. Soon after becoming general counsel for Lybrand in July 1970, I was contacted by Mr. Feiwell, who informed me that he was counsel for the Levitts. He told me that a dispute had arisen between the Levitts and Poloron with respect to the liabilities and net worth of LMC. Feiwell informed me that Poloron had asserted its right to be indemnified by the Levitts for subsequently discovered increases in the LAC deficit as of September 30, 1967, and had withheld substantial sums in the form of Poloron common stock and sales commissions otherwise due the Levitts. Se told me that he had filed a lawsuit against LMC (which Poloron had renamed Foloron Products of Indiana) in the Morthern District of Indiana to recover the sales commissions which had been withheld. Peiwell suggested that Lyprand's assistance with the facts and its possible testimony as an expert with respect to accounting procedures might be helpful in resolving the dispute. I and other Lybrand personnel cooperated with this request and agreed to render what assistance we could, indicating however that there might be problems in our acting as experts for his clients, the Levitts.

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- Lybrand with an amended complaint joining it as a defendant in the Indiana lawsuit. Lybrand was alleged to be liable to the Levitts for the stock and sales commissions which had been withheld from them by Poloron. However, because Lybrand had been joined only shortly before the action was to go to trial, the court severed the claim against Lybrand for Fearing at a later date.
- 11. Soon thereafter, the action was transferred to the Southern District of New York and Feiwell amended the complaint again, this time adding Poloron as a defendant. Demand was made for all sums which Poloron had withheld from the Levitts pursuant to its right of indemnity.
- Levitts, represented by Feiwell, falsely alleged that a <u>certified</u> balance sheet of LMC had been received from Lybrand at the closing, and that this certified balance sheet had been part of a scheme by Lybrand (the Levitts' own auditors) to defraud them with respect to the net worth of their own company. In fact the Levitts thomselves had defrauded both their own auditors and Poloron. As a result they had been able to obtain a more favorable deal for the sale of their stock than would have been otherwise possible, subject, however, to Poloron's right to be indemnified by them for any undisclosed additions to LMC's deficit net worth as of September 30, 1967. The Levitts were apparently claiming that if they had to pay Poloron for the fraud they had perpetrated on it, the accountants should be liable to them for failing to discover their fraud and disclose it to Poloron.
- 13. In the Spring of 1971, I attended settlement discussions between Poloron and the Levitts which appeared fruitless, but in June, 1971 I was told that they had in fact reached a settlement and wished to terminate the litigation.
- 14. Having expended approximately \$1,400 for Lybrand's legal representation in Indiana and \$10,000 for counsel in New York

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after the action was transferred, I was very pleased to see an end to this frivolous litigation. I instructed Lybrand's counsel of record to consent to the voluntary dismissal, believing this to be the end of the matter.

- 15. Not so. Six months later, in the Northern District of Illinois, Feiwell filed suit against Lybrand again, once more falsely alleging that Lybrand had delivered certified balance sheet at the closing and that Lybrand had perpetrated a scheme to defraud. This time, however, Feiwell brought the claim on behalf of Poloron, his former opponent whom he now represented as counsel of record.
- third set of trial counsel to defend this outrageous claim, and instructed them not only to defend the action, but to prepare to seek damages for harassment and fraud. An extension of time to respond to the complaint was obtained, pleadings were prepared, and the depositions of Poloron's officers were noticed. But before Lycrand had responded to the complaint, I was notified that Feivell had filed a notice of dismissal, again voluntarily discontinuing the action. By this time, Lycrand had incurred legal fees to counsel in the sum of \$8,900, in addition to the \$11,400 it had already paid to the two sets of lawyers required to defend the first action.
- 17. At this point, however, I was not ready to assume that the same action would not be brought again, and telephoned Poloron's general counsel in New York to inform him that further repetition of this scurrilous litigation would result in a claim for substantial damages being made against his client by Lybrand. He informed me that that the matter was regrettably not in his hands, but in Feiwell's, and declined to comment further.
- 13. Nine months later, in September of 1977, Feiwell conmenced the present action against Lybrand, filing a complaint

identical to the one in the Northern District of Illinois. Lybrand again retained New York counsel, and has incurred legal expenses in the present action, up to the filing of the present motion by plaintiff and the third-party defendants, in the sum of \$25,560.

- 19. It has recently been revealed for the first time that Poloron is in fact the assignee of the purported claim which the Levitts asserted against Lybrand in the original action in the Northern District of Indiana. As noted above, Lybrand had consented to the dismissal of that action because the Levitts and Poloron said that they had settled and withed to terminate the litigation. However, it is now clear that the "settlement" was no more than an assignment to Poloron of the Levitts' pending claim against Lybrand, accompanied by Poloron's promise to prosecute that claim and turn over 75% of the proceeds to the Levitts.
- 20. Lybrand has thus been served with five complaints on the outrageous claim that it committed a fraud, and is confronted with the third lawsuit demanding substantial damages because of a transaction in which Poloron paid the Levitts \$11,200 for the stock of their insolvent corporation. This scandalous litigation against Lybrand has been a direct result of the fraud perpetrated by the Levitts and Feiwell, and of Poloron's collusive agreement to sue Lybrand and give the Levitts the proceeds. Each complaint has been filed by Mr. Friwell, the first two for the levitts and the last three purportedly on behalf of Poloron. Each complaint has contained falsehoods in addition to spurious allegations of fraud, and Lybrand has been compelled to spend more than \$40,000 to obtain legal representation in the four forums where these suits have been located.

- 21. The joint motion of Pologin and the third-party defendants to dismiss Lybrand's claims against them is without merit and should be denied in all respects.
- 22. Lybrand's motion to dismiss the amended complaint, for summary judgment and for an award of its attorneys' fees should be granted in all respects.

Harris J. A. howitz

Sworn to before me this

4th day of November, 1974

Rober M. P. Ren Notary Justic

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By. 41-27/4370

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AFFIDAVIT OF CARL LEVITT SWORN TO DECEMBER 9, 1974

AFFIDAVIT

STATE OF ILLINOIS)
COUNTY OF C O O K)

CARL LEVITT, being first duly sworn on oath, deposes and says:

- 1. I am a third-party defendant in the within action. I make this affidavit in support of the pending motions to dismiss counterclaims and third-party claims asserted by defendant Lybrand, Ross Bros. & Montgom. y ("Lybrand"), and in opposition to a motion by Lybrand for summary judgment dismissing the complaint.
- 2. In support of its motion for summary judgment,
 Lybrand asserts that there are no material issues of fact, and
 that it is entitled to judgment on the papers, without a trial.
 But I have reviewed the affidavits of Harris J. Amhowitz and
 Powell Pierpoint submitted by Lybrand, and I know, from personal
 knowledge, that the operative "facts" alleged in their affidavits
 are simply untrue. Significantly, neither Mr. Amhowitz nor
 Mr. Pierpoint has any personal knowledge of the facts in this
 matter; Mr. Amhowitz is general counsel for Lybrand, employed by
 them only since July 1970 (according to his own affidavit);
 Mr. Pierpoint is a member of Hughes, Hubbard & Reed, who have
 acted only as New York litigation counsel to Lybrand.

THE UNDERLYING TRANSACTION

of Levitt Manufacturing Corporation ("LMC") to plaintiff Poloron Products, Yaz. ("Poloron-New York"). The sellers were my father, Samuel Levitt, my brother, Jay Levitt, Jack Whitney, and myself, (hereinafter referred to together as the "Levitts") who constituted all of the LMC stockholders.

- 4. The purchase price was \$11,200 plus an amount of stock in Poloron-New York to be determined on the basis of future earnings of LMC, as Lybrand acknowledges. But, in addition, Poloron assumed certain personal liabilities of the Levitts. It assumed and paid a personal debt of \$109,000 of Samuel Levitt, and it assumed the Levitt's personal responsibility for loans on factored accounts totalling several hundred thousand dollars.
- 5. After the acquisition, Poloron-New York changed the name of its new subsidiary from LMC to Poloron of Indiana, Inc. ("Poloron-Indiana"). The Levitts entered into a sales representative agreement with Poloron-Indiana, providing that we would be paid commissions based upon sales consummated. We thereupon formed Dynamark Corporation ("Dynamark") and assigned our sales agreement with Poloron-Indiana to it.
- 6. At the time of the sale of LMC to Poloron-New York, LMC was in a very weak financial position, and we recognized that absent an influx of capital, bankruptcy appeared imminent. The sale to Poloron-New York was, therefore, clearly in our best interests. Although we received virtually no money, we did recognize the possibility of realizing Poloron-New York stock in the event that the finances of the corporation improved, and the sales representative agreement provided u. with the possibility of earning commissions.
- 7. Poloron-New York had a twofold incentive for entering into this transaction. First, the business of LMC, the manufacture and sale of law mowers, was quite compatible with Poloron-New York's other businesses, which are the sale of other home products. Second, with the proper influx of capital which Poloron-New York possessed, the future of LMC could well be quite profitable.

- 8. Since it was assuming the liabilities of LMC,
 Poloron-New York was naturally quite concerned about what those
 liabilities actually were. The balance sheet prepared by
 defendant Lybrand indicated that there was a negative net worth
 of \$316,000. As Lybrand correctly points out, Poloron-New York
 sought, obtained and relied upon personal guarantees of the
 Levitts that the balance sheet prepared by Lybrand was accurate.
- 9. Lybrand's assertion—as if it were an incontrovertible fact—that Poloron—New York did not rely upon the accuracy of Lybrand's balance sheet is absolutely untrue. The closing of the transaction was attended by the two Lybrand accountants who had done the audit, Daniel R. Jenkins and Joseph D. Sharp.

 I, my father, my brother, and our actorney, George Feiwell, also attended the closing. The very purpose of having Lybrand's auditors attend was for all parties—the purchasers and the sellers—to obtain Lybrand's affirmative assurance that the figures on their balance sheet were indeed accurate. All parties were relying completely upon Lybrand's figures; there were no other figures to go on. Common sense indicates that when one of America's most prestigious accounting firms is retained to perform an audit, the result of the audit is relied upon by all the participation involved.
- all of us that the balance sheet was accurate, and that save only the value of inventory, Lybrand would certify the figures it had provided to us. In keeping with that promise, shortly after the closing Lybrand certified the same figures included in the balance sheet for LMC which it provided to all of the parties at the closing.
- · 11. Now, for obvious reasons, Lybrand and its counsel have chosen to repeatedly refer to the balance sheet provided by

Lybrand at the closing as the "tentative" balance sheet, as if repeating it often enough will make it so.

- 12. As I have indicated, there was nothing "tentative" about the balance sheet, and Lybrand assured us that it would certify it, with the possible exception of inventory. Without this assurance from Lybrand, this transaction never would have been effected.
- 13. Other than inventory, the only "tentative" aspect of the transaction related to reserves for uncollected receivables. The parties agreed to review collection experience at the end of a year, and alter accounting figures accordingly.
- to be incontrovertible proof that Poloron-New York did not rely upon the Lybrand balance sheet is utterly meaningless. Lybrand argues that since Poloron-New York relied upon the Levitts' representations that the balance sheet was accurate, they did not rely upon the balance sheet itself. Obviously, Poloron-New York's reliance was on both the balance sheet and the Levitts' warranties. There is no evidence to the contrary, except the utterly false affidavits submitted by Messrs. Sharp and Jenkins, who are a partner and an employee of Lybrand. At the trial, all of the other persons who attended the closing are prepared to testify that the true facts are as set forth in this affidavit.

LYBRAND'S KNOWLEDGE OF THE LMC BOOKS AND RECORDS

15. In the false affidavits submitted by Lybrand on this motion, and in their baseless counterclaims and third-party claims, Lybrand asserts that in preparing the LMC balance sheet it relied upon financial information provided to them by the Levitts. It alleges that the Levitts had knowledge that the balance sheet Lybrand prepared was inaccurate, and it even goes so

so far as to contend that the Levitts removed certain documents from the corporation's records to prevent Lybrand from learning the true financial facts of LMC. Nothing could be further from the truth.

- had personal knowledge of the intimate financial details of the corporation; we relied upon Lybrand to provide us with that information. My father, Samuel Levitt, was president of the corporation. But LMC was headquartered in Michigan City, Indiana, and Samuel Levitt resided in New York. He was an absentee. president with only second-hand knowledge of LMC's financial position. My brother, Jay Levitt, was vice-president in charge of sales. He spent virtually all of his time out of the office selling the products of LMC. His knowledge of LMC's assets and liabilities was also second-hand.
- charge of the internal administration of the corporation.

 Nevertheless, I am not an accountant, and I have had no accounting background. Although I kept abreast of LMC's financial position, I did so by examining the statements, schedules and the like provided to me by the corporation's comptroller and accountants. The accounts of LMC were quite extensive. The list of accounts payable was provided to me on a weekly basis in the form of a computer print-out which extended to many pages. There were over one thousand items listed. The total liabilities of the corporation, even as listed in Lybrand's balance sheet, was in excess of \$2,900,000. Accordingly, it is apparent that the discrepancies which Lybrand failed to uncover, totalling approximately \$220,000, were not such that I would have known about, without being advised by Lybrand.
- 18. Moreover, Lybrand has failed to reveal to the Court that the work it performed for LMC was far more extensive than

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AFFIDAVIT OF CARL LEVITT

merely the auditing of LMC's financial statements. During the summer of 1967, LMC's comptroller was terminated. After unsuccessfully attempting to replace him, Lybrand was retained to bring the books and records of LMC up to date by posting all of the entries which had been neglected since the comptroller's resignation, to prepare financial statements for LMC as at September 30, 1967, and to audit those statements. During the time in which Lybrand performed these functions at the offices of LMC, it had absolute access to all of the corporation's books and records, without exception. Accordingly, it is clear that Lybrand had a far more intimate familiarity with the finances . of LMC than anyone else, and had a better opportunity to understand the total financial condition of the company they were auditing than most auditors enjoy. Furthermore, Lybrand has failed to inform this court that it audited the financial statements of LMC for the prior year ending December 31, 1966, and made a certified report of that audit. Thus Lybrand was already quite familiar with the financial affairs of LMC even prior to the time it was called in to close the books and prepare the financial statement.

19. In paragraphs 7 and 8 of Mr. Amhowitz' affidavit submitted on these motions, he asserts that the Levitts withheld or removed the mention of certain creditors from LMC's books and records so that Lybrand would not discover them. Thus, he asserts that we had a \$45,000 debt to a Swiss bank resulting from a letter of credit transaction which LMC entered into while it was negotiating with Poloron-New York. If Lybrand and its present investigators really believe this assertion, they have demonstrated the same kind of incompetence which led to the original false financial statement of LMC, and all of the subsequent losses sustained as a result thereof. LMC never took out a letter of credit with any Swiss bank, or had any direct dealings of any

kind with a Swiss bank. LMC's only foreign transactions were handled by Delton S.A., a Swiss corporation which purchased and resold to LMC certain supplies and equipment from a Japanese corporation known as Resources and Facilities. Customarily LMC would pay for the merchandise by means of sight drafts, which were basically LMC's unsecured promissory notes payable 90 or 120 days after delivery of the documents of title. These sight drafts were carried on LMC's books as payables to Delton. The transmittal of documents and the collection of sight drafts were customarily handled by LMC's regular bank, First National City Bank of New York and its correspondent bank in Michigan City, Indiana. With respect to the particular transaction alleged in Mr. Amhowitz' affidavit, it is my recollection that this transaction, like all the transactions with Delton S.A., was handled by means of a sight draft. LMC never applied for or obtained a letter of credit for this transaction. This transaction would have been listed amongst our accounts payable in the documents which Lybrand had in closing the books of LMC and preparing its audit, and would have been disclosed by Lybrand had it performed its audit with any degree of competence.

Levitts' written assurance "that there were no outstanding letters of credit" is entirely misplaced. The representation was included in a letter prepared by Lybrand for my signature and addressed to Lybrand. A copy is annexed hereto as Exhibit "A". In asking me to sign it, Lybrand advised me that it was the standard form of accountants' letter assuring them that the books and records were accurate; I signed it without reading it extensively. Fevertheless, the particular paragraph now relied upon by Lybrand and written by Lybrand, is practically meaningless since it is cast in the form of a double negative. In fact, as it was drafted, it is absolutely true. It reads as follows:

"There were no unused balances of letters of credit outstanding against which no drafts had been drawn."

- 21. It appears that Lybrand has now attempted to cast a spell of mystery over an innocuous corporate transaction by making an unfounded reference to a Swiss bank.
- 22. In Mr. Amhowitz' affidavit, the only other allegation he makes as to the alleged withholding of information from Lybrand in connection with the audit is equally baseless. He asserts that third-party defendant George Feiwell, the attorney who represented the Levitts and LMC throughout the negotiations, failed to reveal to Lybrand that two lawsuits for approximately \$29,000 were threatened against LMC as at September 30, 1967. In fact, at that time, those items were nothing more than disputed invoices which later ripened into litigations. Mr. Feiwell's representation was absolutely accurate since he had not even been advised of these matters at the time he made the representation. We had not yet recognized that these matters might result in litigation and had not referred them to our attorney. We were attempting to resolve them without counsel, as disputed invoices were generally resolved.
- 23. From the foregoing, it is clear that Lybrand's summary judgment motion is utterly baseless. Its audit was incompetently performed, and it is that incompetence which led to the damages sought in the present action.

THE FIRST LAWSUIT

24. After the transaction, the Levitts' corporation, Dynamark, began to act as sales representative for LMC, which was renamed Poloron-Indiana. When Poloron discovered the serious deficiencies in the Lybrand audit and the fact that the corporation's liabilities were significantly greater than they had been represented to be, Poloron-Indiana sought to recoup its

losses by withholding sales commissions which Dynamark had earned by selling Poloron-Indiana's products, and stock to which the Levitts were entitled. In order to collect these withheld commissions and stock, Dynamark brought action against Poloron-Indiana in the United States District Court for the District of Indiana.

- 25. Mr. Amhowitz, in paragraph 9 of his affidavit, describes a meeting he had with Mr. Feiwell concerning this action. His description of the meeting is untrue.
- 26. Mr. Feiwell and I both met with Mr. Amhowitz for the purpose of obtaining the assistance of Lybrand in connection with the litigation commenced against Poloron-Indiana. To our great surprise, Mr. Amhowitz advised us that Lybrand would not assist us in any way unless Dynamark and the Levitts provided Lybrand with a general release of any liability for the work Lybrand had already done, and an indemnification for anything it might do in the future. We absolutely refused and left his office.
- 27. Moreover, at about the same time, an accountant employed by us, George Richard, traveled to Indiana to review the Lybrand work papers assembled in connection with the 1967 audit. He was only permitted to examine the papers for about 1½ hours, but even during this short time he found errors in the audit. He has advised me that he recalls finding that Lybrand listed certain assets, valued at approximately \$80,000 as both inventory and an account receivable, thereby double counting the asset.
- 28. In an audit performed at Poloron's request by Touche Ross, the additional serious discrepancies in the Lybrand audit were uncovered, all of which gives rise to the claims asserted against Lybrand. We amended our complaint in the Indiana action and included Lybrand as a defendant, claiming that its deficient audit had caused us the damages we had suffered.

- 29. The litigation proceeded for a period of time, and was then transferred to the United States District Court for the Southern District of New York. At the same time, Poloron-New York brought suit against the Levitts in the Supreme Court of the State of New York. These matters were actively litigated.
- 30. By mid-1971, however, all of the parties to these actions (other than Lybrand) reached terms of settlement of their differences, recognizing that the real wrongdoer, Lybrand, was the cause of all their problems. The settlement agreement, a copy of which is attached hereto as Exhibit "B", provided that Poloron would pay Dynamark one-half of the \$187,103.78 worth of commissions which had been withheld, or \$93,554.39. In addition, it was provided that Poloron-New York would prosecute the claims against Lybrand and provide Dynamark with 75% of the proceeds of any recovery against Lybrand. A stipulation of discontinuance of the pending actions was executed. It was signed by Lybrand, without prejudice to renewing the action.
- 31. It is in this sense, that Dynamark's and the Levitts' claims against Lybrand were assigned to Poloron. The claim belongs to Poloron-New York, except possibly to the extent that Poloron has recouped a portion of its losses by withholding approximately \$93,000 in commissions otherwise due to Dynamark. In that sense, Poloron-New York's pursuance of that aspect of the claim against Lybrand can be regarded as the assertion of an assigned claim of Dynamark and the Levitts.

THE CROSS CLAIMS AND COUNTERCLAIMS

32. If Lybrand itself has any belief in the substance of its counterclaims and third-party claims, such belief can only be regarded as paranoid, since it has no relationship to reality. There is and never has been any attempt or conspiracy to defraud Lybrand or to maliciously prosecute it. It is Lybrand's

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AFFIDAVIT OF CARL LEVITT

incompetent audit of LHC which gave rise to losses of approximately \$220,000. For that sum it should be held accountable.

33. Accordingly, Lybrand's motion for summary judgment should be denied and the motion to dismiss the counterclaims and third party claims should be granted.

CARL LEVITT

SUBSCRIBED and SWORN to before me this 9th day of December, 1974.

Charlette Brocessed

EXHIBIT A TO LEVITT AFFIDAVIT SWORN TO DECEMBER 9, 1974

JAN 3 0 19Ch

Mesers. Lybrand, Ross Bros. & Montgomery 400 First Bank Building South Bend, Indiana

Dear Sirs:

In connection with your examination of the balance sheet of Levitt Manufacturing Corp., as of September 30, 1967, I hereby certify that, as of that date, to the best of my knowledge and belief:

- 1. All liabilities have been taken up on the books of account, including the liability for all purchases to which title has passed prior to the stated date.
- 2. No asset of the company was pledged or is now pledged as security for any liability except as follows:

The First National City Bank of New York holds assigned accounts receivable and a security interest in inventory and machinery and equipment.

- 3. There were no unused balances of letters of credit outstanding against which no drafts had been drawn.
- 4. There were no contingent liabilities except as reported by attorney George Feiwell. These include the following:
 - Detroit Tool & Manufacturing Co. vs. Levitt Manufacturing Corp.
 - 2. Levitt Manufacturing Corp., vs. Nasco : Industries, Inc., regarding Milway, Inc.
 - 3. Levitt Manufacturing Corp., vs. Yard Man of Illinois, Inc.
 - 4: Clements Box Company vs. Levitt Manufacturing Corp.
- 5. There were no purchase commitments in excess of normal requirements or at prices in excess of the prevailing market prices, nor agreements to repurchase items previously sold.
- 6. There were:
 - (a) no commitments for purchase or sale of securities or to repurchase the company's stock or any other securities; nor any options given by the company, including options on company's capital stock; nor bonus or any profit-sharing arrangements.

which, in my judgment, might adversely affect the company.

- 7. There were no defaults in principal, interest, sinking fund, or redemption provisions with respect to any issue of securities or credit agreements, or any breach of coverant of a related indenture or agreement.
- 8. Contractual obligations for plant construction and purchase of real property, equipment and patent or other rights amounted to approximately \$ __0_
- 9. Except as are reflected in the balance sheet, there were no agreements under which any of the liabilities of the company had been subordinated to any other of its liabilities nor were any receivables owned by the company subordinate to any other liabilities of the debtor companies.
- 10. No redoral income tax returns have been examined and reported upon by the Internal Revenue Service; courns of the years since 1665 are still open; the provision balance sheet is adequate to cover any additional assessments result from examinations additional or from those to be able by the Internal Revenue.
- 11. There have been no material changes since September 30, 1957, in respect of any of the above items 4 to 10,

· ar rillands,

Very truly yours,

LEVITT MANUFACTURING CORP.

(name and title of person signing)

Lovember 20, 1957

EXHIBIT B TO LEVITT AFFIDAVIT SWORN TO DECEMBER 9, 1974

SETTLEMENT AGREEMENT

WHEREAS, DYNAMARK CORPORATION, SAMUEL LEVITT, CARL LEVITT, and JAY LEVITT are plaintiffs in a certain action entitled Dynamark Corporation, et al, v. oloron Products Of Indiana, Inc., et al, 70 Civ. 5225, in the United States District Court for the Southern District of New York, and POLORON PRODUCTS OF INDIANA, INC. and POLORON PRODUCTS, INC. are two of the defendants in said action; and

WHEREAS, POLORON PRODUCTS, INC. is the plaintiff in a certain action entitled Poloron Products, Inc. v. Samuel

Levitt, Carl Levitt and Jay Levitt, No. 19632/70, in the Supreme Court of the State of New York, County of New York, and SAMUEL LEVITT, CARL LEVITT and JAY LEVITT are the defendants therein; and

WHEREAS, all of the foregoing parties are desirous of amicably and permanently terminating all manner of controversy, disputes, and litigation between themselves; and

WHEREAS, POLORON PRODUCTS OF INDIANA, INC. has represented to DYNAMARK CORPORATION that it owes to DYNAMARK but is holding under claim of right \$187,103.78 of commissions due from POLORON PRODUCTS OF INDIANA, INC. to DYNAMARK CORPORATION pursuant to the terms of a certain Sales Representative's Agreement dated December 1, 1967, and have promised and agreed to pay to DYNAMARK CORPORATION Fifty Percent (50%) of said amount, or \$93,554.39; and

211 A

EXHIBIT B TO LEVITT AFFIDAVIT

. WHEREAS, SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, and DYNAMARK CORPORATION have promised and agreed to waive, release and remise forever, for themselves, their respective heirs, executors, administrators, successors and assigns, all claims of any kind and character, in Law or Equity, against POLORON PRODUCTS, INC., POLORON PRODUCTS OF INDIANA, INC., JOSEPH BROWN, ROBERT BROWN, and MENAHEM JACOBI, arising out of and/or based upon a certain Agreement dated as of October 27, 1967, between POLORON PRODUCTS, INC., LEVITT MANUFACTURING CORPORATION, SAMUEL LEVITT, CARL LEVITT, JAY LEVITT and JACK WHITNEY, by which POLORON PRODUCTS, INC. purchased and SAMUEL LEVITT, CARL LEVITT, JAY LEVITT and JACK WHITNEY sold, all of the outstanding stock of LEVITT MANUFACTURING CORPORATION (said Agreement to be hereinafter referred to as the "Purchase Agreement"); a certain Sales Representative's Agreement between LEVITT MANUFACTURING CORPORATION and SAMUEL LEVITT under date of December 1, 1967 (hereinafter referred to as the "Sales Representative's Agreement"); and all other prior and subsequent written and oral representations or agreements inducing, modifying, altering and/or effectuating the aforesaid Purchase Agreement and Sales Representative's Agreement, or any of the terms thereof; and

WHEREAS, POLORON PRODUCTS, INC. and POLORON PRODUCTS
OF INDIANA, INC. have promised and agreed to waive, release and
remise for themselves, their successors and assigns all claims
of any lind and character, in Law or Equity, against SAMUEL
LEVITT, CARL LEVITT, JAY LEVITT, and DYNAMARK CORPORATION, their

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EXHIBIT B TO LEVITT AFFIDAVIT

heirs, executors, administrators, successors, and assigns, arising out of and/or based upon the aforesaid Purchase Agreement dated October 27, 1967, the Sales Representative's Agreement dated December 1, 1967 and all other prior and subsequent written and oral representations or agreements inducing, modifying, altering, and/or effectuating the aforesaid agreements or any of the terms thereof; and

WHEREAS, DYNAMARK CORPORATION has promised and agreed to waive, release, and remise forever, for itself, its successors and assigns, all claims against POLORON PRODUCTS, INC. and POLORON PRODUCTS OF INDIANA, INC. arising out of the employment of the aforesaid JACK WHITNEY and one WILLIAM THOMAS; and

WHEREAS, POLORON PRODUCTS, INC. possesses claims, demands, actions and causes of action against LYBRAND, ROSS BROTHERS & MONTGOMERY (hereinafter referred to as "LYBRAND") arising out of and/or based upon the audit performed by the latter upon the books and records of LEVITT MANUFACTURING CORPORATION, and the balance sheet of said corporation as of September 30, 1967, prepared and certified by LYBRAND, upon which POLORON PRODUCTS, INC. relied to its detriment; and

WHEREAS, POLORON PRODUCTS, INC. has promised and agreed diligently and conscientiously to prosecute its aforesaid claims against LYBRAND and to assign, grant and sell to DYNAMARK CORPORATION Seventy-Five Percent (75%) of the proceeds of said claims and causes of action against LYBRAND, as further consideration for DYNAMARK CORPORATION'S entering into this

Settlement Agreement.

NOW, THEREFORE, in consideration of the promises and representations hereinabove and hereinafter stated, the parties hereto agree as follows:

1. POLORON PRODUCTS, INC., POLORON PRODUCTS OF
INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, and JAY LEVITT,
each severally and mutually agree to execute a Mutual
Release, in the form attached hereto as Exhibit A, releasing
and forever discharging each other, and the successors,
heirs and assigns of each other, of and from all manners of
actions, causes of action, sults, claims and demands set
forth, or which arise out of any and all transactions complained of, in the complaint as amended in the action in the
United States District Court for the Southern District of New
York entitled Dynamark Corporation, et al, v. Poloron Products
Of Indiana, Inc., et al, No. 70 Civ. 5225, and in the
complaint in the action in the Supreme Court of the State of
New York, County of New York, entitled Poloron Products, Inc.
v. Samuel Levitt et al, No. 19632/70, or which might have

v. Samuel Levitt et al, No. 19632/70, or which might have been complained of with respect thereto in either or both complaints in said actions, or arising out of or based upon the institution, prosecution, defense, compromise or settlement of those actions.

- 2. The parties hereto agree to execute stipulations to dismiss the complaints in the actions described in the preceding paragraph.
- 3. POLORON PRODUCTS, INC. and POLORON PRODUCTS
 OF INDIANA, INC. agree to pay to DYNAMARK CORPORATION at
 the time of execution hereof one-half (1/2) of the amount
 of the commissions now due and owing to DYNAMARK CORPORATION
 and now being held under claim of right by POLORON PRODUCTS
 OF INDIANA, INC., said amount having been represented by
 POLORON PRODUCTS OF INDIANA, INC. to be \$187,108.78, and
 one-half (1/2) thereof, being \$93,554.39.
- 4. POLORON PRODUCTS, INC. hereby agrees to execute the Assignment of Proceeds attached hereto as Exhibit B.
- 5. POLORON PRODUCTS, INC. hereby agrees and pledges to prosecute its claims and causes of action against LYBRAND, as hereinabove described, diligently and conscientiously, to a successful conclusion.

- Five Percent (25%) of the out-of-pocket costs of the litigation which it shall bring against LYBRAND, the balance, or Seventy-Five Percent (75%) shall be paid by DYNAMARK CORPORATION. The out-of-pocket costs, for purposes of this Agreement, shall be as follows: filing fees; deposition and hearing transcripts; expenses of Xeroxing or other duplication of documents; essential transportation expenses; and other costs directly and specifically related to the conduct of the litigation; providing, however, that POLORON PRODUCTS, INC. and DYNAMARK CORPORATION will each bear the costs of the transportation, room and board expenses, if any, of their own officers or employees whose presence may be required for testimony at depositions, hearings or trial.
- against either or both POLORON PRODUCTS, INC. or its subsidiary, POLORON PRODUCTS OF INDIANA, INC. and/or SAMUEL

 LEVITT, CARL LEVITT and JAY LEVITT, the parties hereto as defined in Paragraph 6, except attorneys fees, agree to pay the costs/of defending against said counterclaim and any judgment which may be obtained upon it by

 LYBRAND, on the same prorata basis as set forth above; that is Seventy-Five Percent (75%) payable by DYNAMARK CORPORATION and Twenty-Five Percent (25%) payable by POLORON PRODUCTS,

 INC.
- 8. Irrespective of the amount of the recovery obtained by POLORON PRODUCTS, INC. in the prosecution of its claim against LYBRAND, and even if no recovery whatsoever

is obtained in said litigation, the parties hereto understand and intend that this Settlement Agreement shall terminate, settle and compromise, all claims, causes of action, demands, or the like which POLORON PRODUCTS, INC. and POLORON PRODUCTS OF INDIAMA, INC., or either of them, shall have against DYNAMARK CORPORATION, SAMUEL LEVITT, CARL LEVITT or JAY LEVITT, and shall terminate, compromise and settle all manner of demands, causes of action or claims which DYNAMARK CORPORATION, SAMUEL LEVITT, CARL LEVITT or JAY LEVITT, or any of them, has or shall have against POLORON PRODUCTS, INC. and POLORON PRODUCTS OF INDIANA, INC., and in particular, POLORON PRODUCTS, INC. and POLORON PRODUCTS OF INDIANA, INC. shall have no further obligations of any kind, including obligations to pay any sum of money to DYNAMARK CORPORATION, SAMUEL LEVITT, CARL LEVITT or JAY LEVITT, and the latter parties shall have no obligation to pay to POLORON PRODUCTS, INC. and/or POLORON PRODUCTS OF INDIANA, INC. any further sum of money, except as provided in Paragraphs 6 and 7 above.

- 9. All parties agree to execute whatever documents are necessary at any time to effectuate the purposes of this Agreement, including but not limited to any and all documents necessary to effect the assignment of the proceeds of the claim of POLORON PRODUCTS, INC. against LYBRAND as hereinabove described to DYNAMARK CORPORATION.
- 10. If any portion of this Agreement shall be invalidated by any court of competent jurisdiction,

217 A

EXHIBIT B TO LEVITT AFFIDAVIT

and said portion of this Agreement shall be held unenforceable, then said provision or portion of this Agreement shall be treated for all purposes as being non-existent, and in all other respects the parties hereto shall be bound by the remaining provisions of this Agreement.

•	DATED this	day of	1971.
Attest:		POLORON PRODUCTS, INC.	
	Secretary	Ву	
Attest:		POLORON PRODUCTS OF INDIAN	
	Secretary	Ву	*********
		DYNAMARK CORPORATION	
		Ву	
Attest:			
	Secretary	Sam	el Levitt
: :			
			arl Levitt
		•	
			lay Levitt

AFFIDAVIT OF MENAHEM JACOBI SWORN TO DECEMBER 10, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff,

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AFFIDAVIT

:

-against-

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand), 72 Civ. 3884 (WCC)

C. SHEET WATER

Defendant and Third-Party Plaintiff,

-against-

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FEIWELL,

Third-Party Defendants.

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

MENAHEM JACOBI, being duly sworn, deposes and says:

- 1. I am the secretary-treasurer of Poloron Products, Inc. ("Poloron"), plaintiff in the above-entitled action. I make this affidavit in support of motions to dismiss counterclaims and third-party claims interposed by defendant Lybrand, Ross Bros. & Montgomery ("Lybrand"), and in opposition to Lybrand's motion to dismiss, or for summary judgment on the amended complaint.
- 2. I was one of the representatives of Poloron at the closing of the purchase by Poloron of Levitt Manufacturing Corporation ("LMC") in 1967, and I am fully familiar with the facts and circumstances surrounding that purchase, including. Lybrand's role therein.

AFFIDAVIT OF MENAHEM JACOBI

- 3. Poloron, a publicly held corporation since 1955, has long been engaged in the manufacture of picnic goods and equipment. Prior to the purchase of LMC, Poloron decided to diversify into the field of leisure-time activities. Accordingly, Poloron decided to purchase LMC, a manufacturer of lawnmowers, in the hope that LMC would become a profitable company.
- 4. Poloron purchased LMC from third-party defendants Samuel Levitt, Carl Levitt and Jay Levitt ("the Levitts") in December 1957, and changed its name to Poloron Products of Indiana, Inc. ("Poloron-Indiana").

POLOROM'S RELIANCE UPON LYBRAND

- its conduct in connection with auditing LMC's financial records since Lybrand never agreed to certify the balance sheet. Lybrand also asserts that, in purchasing LMC, Poloron relied exclusively upon representations by the Levitts concerning the financial condition of their company. This simply is not true.
- 5. Although Poloron relied, at least in part, upon the Levitts' indemnification agreement and the concommitant right to offset commissions, the far more important factor upon which Poloron relied in purchasing LMC was the Lybrand audit of the LMC financial statements, and the Lybrand balance sheet.
- 7. Our reliance was placed much more heavily upon the Lybrand audit because we had serious reservations as to the Levitts' financial positions and their ability to meet possible deficits in the financials.
- 3. At the December 1957 closing of the purchase of LMC, at which I was present, two of Lybrand's accountants, Joseph D. Sharp and Daniel E. Jenkins, presented a handwritten balance

AFFIDAVIT OF MENAHEM JACOBI

sheet. Messrs. Sharp or Jenkins indicated in my presence that Lybrand would certify the financial figures with the minor exception of inventory valuation, and required reserve for uncollectable receivables.

- 9. With respect to inventory valuation, Poloron was satisfied that it had sufficient knowledge of the nature and value of the LMC inventory. With respect to reserve for receivables, the Levitts and Poloron agreed to adjust the reserve following a period of actual experience in collections after the closing.
- 10. Unequivocally, however, Poloron relied upon the assurances by Lybrand's representatives that actual payables and receivables, as they appeared on the Lybrand balance sheet, were accurate, and that Lybrand would certify them as such. Indeed, after the closing, Lybrand did certify these very figures. It is these certified figures that Poloron subsequently discovered were erroneous. The errors were so clearly discoverable by competent accountants that Lybrand's mistakes are fraudulent.
- Il. As Lybrand correctly notes, Poloron and the Levitts had agreed that Poloron could refuse to consummate the purchase if the audit revealed that LHC's liability exceeded a specified figure. The audit did reveal that the liabilities were greater than the agreed figure, and it was a difficult decision for Poloron as to whether it should abrogate the transaction. We decided, however, that the total liability, although greater than anticipated, was not so large as to compel Poloron to withdraw. Nevertheless, if Poloron had had any notion that the actual liabilities of LMC were as far in excess of Lybrand's figures as we later learned them to be, it is my belief that the deal would never have been consummated.

AFFIDAVIT OF MENAHEM JACOBI

12. In an obvious attempt to obfuscate the facts, Lybrand has asserted that Poloron suffered no financial damages as a result of Lybrand's incompetent audit. Indeed, Lybrand contends that the sole consideration which was paid by Poloron for LMC was \$11,200. These assertions are completely false. In the purchase of LMC, and thereafter, Poloron made a substantial financial investment in LMC, in reliance upon Lybrand's representations.

-Tit

- 13. In addition to paying the sum of \$11,200, Poloron assumed personal guarantees of the Levitts with respect to the factored accounts of LMC which totalled hundreds of thousands of dollars. Since the Levitts were relieved of this personal obligation, and since Poloron became the guarantor, this was a very large and valuable consideration. In addition, an outstanding loan of \$109,000 on which Samuel Levitt was personally liable, was immediately paid by Poloron.
- 14. Moreover, Poloron devoted large financial resources to Poloron-Indiana. As of October 31, 1974, Poloron's loans to Poloron-Indiana totalled \$7,877.00. Because Poloron-Indiana has not been a profitable subsidiary, it is being liquidated not sold at a profit as Lybrand asserts and Poloron will lose a sizeable portion of its loans. Lybrand's assertion that Poloron-Indiana has shown profits over the years is obviously false from the very fact that it is being liquidated. It was profitable for a few years, but more recently it has shown large losses each year, which have more than offset the earlier gains.
- 15. Lybrand is clearly responsible for the deficiencies in its audit which are far exceeded by the total actual losses sustained by Poloron in relying upon that audit.

AFFIDAVIT OF MENAHEM JACOBI

THE ASSIGNMENT OF THE LEVITTS' CLAIM

- 16. The original action brought among the parties was the Levitts' Dynamark suit against Poloron-Indiana. After an intensive period of litigation, and the transfer of the action to New York, the parties, other than Lybrand, settled their dispute. The settlement agreement between Poloron-Indiana, the Levitts and Dynamark provided for a cash payment by Poloron to Dynamark of \$93,554.39. In addition, Poloron agreed to prosecute its own claims, and the claims of Dynamark and the Levitts, against Lybrand. It was further agreed that Poloron would provide Dynamark with 75% of the proceeds which it received from any recovery against Lybrand.
- 17. Lybrand's asserted belief that it thought the matter was then at an end is obviously untrue. The stipulation of discontinuance signed by Lybrand was without prejudice.
- 18. I have been advised by counsel that the assignment of the claims of the Levitts and Dynamark to Poloron, made in connection with the settlement of an earlier lawsuit, is not champertous and is not violative of the provisions of the New York Judiciary Law or anything else as Lybrand contends.
- 19. Nor is there, or has there ever been, any malicious prosecution of claims against Lybrand, or conspiracy to defraud it. The action brought by Poloron is an honest lawsuit to recover damages occasioned by Lybrand's incompetent audit.

THE SECOND COUNTERCLAIM

20. The second counterclaim asserted by Lycrand against Poloron is based upon an account annexed to the counterclaim allegedly for the nonpayment of a bill rendered by Lybrand to

223 A

AFFIDAVIT OF MENAHEM JACO.

Poloren-Indiana in the amount of \$4,830 for accounting services.

- 21. The part of the motion addressed to this claim is based upon its insufficiency on its very face since the claim is asserted against Poloron-New York, whereas the invoice, on its face, indicates that it was rendered to another party, Poloron-Indiana. Accordingly, the claim is deficient and must be dismissed; Lybrand's reminders that we operate in a system of notice pleading are inapplicable when the pleading is so obviously defective.
- 22. Nevertheless, the facts giving rise to this spurious claim should be revealed. Some time after the LMC sale to Poloron-New York, Poloron-New York planned a secondary offering of its stock to the public. In connection with this offering, it needed an accountants' certification of the financial records of what was then its subsidiary, Poloron-Indiana. Since Lybrand had done the work through September 30, 1967, it was retained to perform this service.
- 23. The audit which Lybrand thereupon performed revealed the discrepancies it had earlier failed to find, which give rise to the present lawsuit. Recognizing that if it certified these new figures it would leave itself open to possible liability in connection with its original audit, Lybrand refused to certify anything. Since it was retained to certify the financial statements of Poloron-Indiana and failed to perform this service, it was obviously not paid.

COMCLUSION

24. Lybrand has attempted to cloud the real fact of this lawsuit, which is simply that the certified balance sheet

AFFIDAVIT OF MENAHEM JACOBI

upon which Poloron relied was grossly inaccurate and incompetently prepared by Lybrand, and caused great damage to Poloron.

Common sense dictates that parties to a substantial business transaction would not retain one of the nation's most prominent accounting firms if they did not intend to rely upon the results of its audit.

25. Poloron was assured by Lybrand at the closing that the balance sheet figures for payables and receivables were accurate and would be certified, and Poloron properly relied upon that representation. The figures were certified as promised, but were completely inaccurate. As a result, Poloron has suffered cubstantial damages. Lybrand's assertions to the contrary are completely without merit.

HENAHEM JACOBI

Sworn to me this

Aday of December, 1974.

OHARES ORTHER
Notary Public, State of Naw York
No. 03-9235590
Outlined in Brans County
Commission Expires March 10, 1976

AFFIDAVIT OF MARTIN R. GOLD SWORN TO DECEMBER 11, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff,

-against-

AFFIDAVIT

LYBRAID, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff, 72 Civ. 3884

-against-

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FEIWELL,

Third-Party Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

MARTIN R. GOLD, being duly sworn, deposes and says:

- 1. I am a member of Gold, Farrell & Marks, attorneys / for plaintiff Poloron Products, Inc. ("Poloron") and third-party defendants Carl Levitt, Jay Levitt, Samuel Levitt ("the Levitts") and George Feiwell. I make this affidavit in opposition to the motion by defendant Lybrand, Ross Bros. & Montgomery ("Lybrand") to dismiss the complaint or for summary Judgment, and in support of the motion by Poloron, the Levitts and Feiwell to dismiss Lybrand's counterclaims and third-party complaint.
- 2. Lybrand's counterclaims and third-party claims for malicious prosecution allege, in substance, that Poloron,

AFFIDAVIT OF MARTIN R. GOLD

the Levitts and Feiwell commenced lawsuits against Lybrand in bad faith and without any factual or legal grounds. In addition, in Lybrand's motion to dismiss and for summary judgment, it seeks to have this Court impose financial penalties for bringing the present action. All of these arguments, however, have been previously litigated by Lybrand in this action, and the Court has ruled against Lybrand.

- 3. Instead of answering Poloron's complaint, Lybrand originally made a motion, pursuant to Rule 11, Fed. R. Civ. P., to dismiss Poloron's complaint as a sham, and to impose financial sanctions against Feiwell. That motion was denied by Judge Charles E. Stewart, Jr., the judge to whom the action had previously been assigned, in an order dated March 19, 1973. A copy of that order is annexed hereto as Exhibit C.
- 4. Unsatisfied with that decision, Lybrand sought and obtained reconsideration and oral argument of its Rule 11 notion. At the oral argument before Judge Stewart on May 2, 1973, Lybrand's counsel argued, as it does on the present motions, that Poloron had suffered no damages under Rule 10b-5 because it had paid the Levitts a nominal \$11,200 consideration for their tusiness, that Poloron's complaint was deficient for a variety of reasons including the purported failure to properly all scienter, that Poloron had no evidence of an intention by Lybrand to defraud, and that this lawsuit had been commenced with an improper and ulterior motive.
- 5. After considering the lengthy oral argument, affidavits and memoranda submitted by the parties, Judge Stewart, in an order dated May 8, 1973 (Exhibit D), adhered to his

AFFIDAVIT OF MARTIN R. GOLD

previous determination that Lybrand's Rule 11 motion was without merit.

- 6. Judge Stewart's decisions have resolved, against Lybrand, the same issues which it has now brought before the Court, i.e., the factual and legal sufficiency of Poloron's complaint, the purported bad faith in bringing the action, and the propriety of imposing financial sanctions. Accordingly, the decisions by Judge Stewart have established the law of the case on these issues, and Lybrand is prohibited from relitigating them anew, under different labels.
- 7. Since the legal sufficiency of Poloron's complaint has been sustained by Judge Stewart, Lybrand's motion to dismiss should be denied. Since Judge Stewart found that there was no improper purpose in bringing this lawsuit, the malicious prosecution counter-claim and third-party complaint should be dismissed, and the motion to extract financial penalties from Poloron should be denied.

Sworn to before me this

11th day of December, 1974.

Notary Public, State of New York No. 33-2235250

Cucithed in Brank County

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK S. D. OF MI

POLORON PRODUCTS, INC.,

Plaintiff,

72 Civ. 3884 (WCC)

- against -

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand), MEMORANDUM AND ORDER

Defendant and Third-Party Plaintiff,

#42169

- against -

POLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and GEORGE FEIWELL,

Third-Party Defendants.

CONNER, D. J.:

This is an action by Poloron Products, Inc. (Poloron) under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Presently pending before the Court are various motions challenging the sufficiency of the claims asserted by the parties to this action. In order to render the legal issues presented by these motions understandable, it is necessary to set forth the relationships of the parties and the procedural history of this action.

In October, 1967, Poloron entered into an agreement to purchase all of the issued and outstanding stock of Levitt Manufacturing Corporation (LMC) from Samuel, Carl and Jay Levitt. Coopers & Lybrand (Lybrand), a firm of certified public accountants, prepared the financial statement in connection with the transaction.

The agreement provided that in exchange for the company, the Levitts would receive a down-payment of \$11,200 in cash and, in subsequent years, Poloron stock, whose market value constitutes a specified percentage of LMC's future earnings. A separate agreement provided that Samuel Levitt would continue to be associated with the company as a sales representative; this agreement was assigned to Dynamark Corporation (Dynamark), a corporation owned and controlled by the Levitts. Poloron subsequently changed LMC's name to Poloron Products of Indiana, Inc. (Poloron-Indiana).

Following the closing of the transaction, Poloron's own auditors, Touche, Ross, Bailey and Smart, reviewed the books and records of the newly acquired subsidiary, and allegedly discovered facts which revealed that LMC had been overvalued by approximately \$220,000.

Poloron assumed and discharged all of the liabilities of Poloron-Indiana and, pursuant to its rights under the acquisition agreement, withheld funds which otherwise would

have been due under the sales representative agreement.

In May, 1970, Dynamark instituted an action against

Poloron-Indiana in the United States District Court for
the Northern District of Indiana seeking to recover the

commissions which had been withheld. Thereafter, in

September, 1970, Dynamark obtained an order permitting
it to amend its complaint to include Lybrand as a defendant.

In November, 1970, on the motion of Poloron-Indiana, the action was transferred to this Court, 70 Civ. 5225. Subsequently, an amended complaint was served and filed, realleging the claims against Lybrand and adding Poloron as a defendant. After some months, however, Poloron and Samuel Levitt (the principal figure among the plaintiffs) reached an accord. They agreed that the losses which they had sustained were principally the result of false financial statements prepared by Lybrand, and that the pending litigation would be terminated and that all of their rights would be assigned to Poloron, which would pursue the action against Lybrand alone. The settlement agreement provided that seventy-five per cent of any recovery would belong to Dynamark. These terms were apparently never disclosed to Lybrand. Nonetheless, on July 7, 1971, a stipulation of discontinuance, without prejudice, signed by all parties was filed.

ATTENDED TO SEE TO SEE TO

MEMORANDUM AND ORDER

Pursuant to the settlement agreement, Poloron filed a complaint against Lybrand in the United States District Court for the Northern District of Illinois, 71 C 3137, containing allegations which apparently are substantially similar to those asserted against Lybrand in the original action and which track the allegations of the complaint in the instant action. Before Lybrand answered that complaint, the Seventh Circuit Court of Appeals rendered a decision which Poloron contends substantially affected its ability to proceed against Lybrand. Accordingly, on February 9, 1972, Poloron filed a notice of dismissal pursuant to Rule 41(a)(1)(i), F.R.Civ.P.

Shortly thereafter, Poloron commenced the present action. Lybrand served and filed an answer and counterclaims, and a third-party complaint against Poloron-Indiana, Carl Levitt, Jay Levitt, Dynamark and George Feiwell. The first counterclaim contained in Lybrand's answer alleges that Poloron instituted the second and third actions maliciously and without probable cause. The second counterclaim seeks recovery for an alleged debt of \$4,830 for professional services rendered. The third-party complaint seeks indemnification for any judgment which Poloron may recover against Lybrand.

The parties subsequently made the motions which are presently pending before the Court:

- 1) On September 24, 1974, Poloron and thirdparty defendants Carl Levitt, Jay Levitt, Dynamark and
 George Feiwell moved pursuant to Rule 12(b)(6), F.R.Civ.P.,
 for an order dismissing the two counterclaims asserted in
 Lybrand's answer and the second claim for relief contained
 in Lybrand's third-party complaint;
- 2) on October 7, 1974, Poloron-Indiana moved pursuant to Rule 12(b)(6), F.R.Civ.P., to dismiss the second claim for relief contained in the third-party complaint;
- 3) on November 6, 1974, Lybrand moved: a) pursuant to Rule 12(b)(6), F.R.Civ.P., to dismiss the complaint for failure to state a cause of action and on the ground of resjudicata; b) for summary judgment pursuant to Rule 56, F.R. Civ.P.; and, c) for an award of attorney's fees;
- 4) on November 25, 1974, Poloron-Indiana moved pursuant to Rule 56, F.R.Civ.P., for summary judgment as to the second claim for relief contained in the third-party complaint on the ground that it is time-barred.

· II.

The Main Action

The threshold question presented by Lybrand's motion to dismiss the complaint on the ground of res judicata is whether Rule 41(a)(1), F.R.Civ.P., the so-called "two dismissal" rule, bars this action.

Rule 41(a)(1) provides two methods by which an action may be voluntarily dismissed without court order:

"an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action."

The Rule, however, restricts the right of dismissal by notice:

"Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the ited States or any state an action based on or including the same claim." Rule 41 (a) (1), F.R.Civ.P.

It is undisputed that the Indiana-New York action and the Illinois action were "based on or including the same claim." Moreover, the Illinois action was unquestionably terminated by a notice of dismissal. Plaintiff, however, contends that the present action is not barred by the two-dismissal rule since 1) a dismissal by notice which follows a dismissal by stipulation does not operate as an adjudication on the merits, and 2) it was not the plaintiff in the Indiana-New York action and therefore the Illinois action was not dismissed by "a plaintiff who has once dismissed."

Insofar as concerns the first contention, the two-dismissal rule, on its face, is literally applicable whenever a notice of dismissal is filed by "a plaintiff who has once dismissed * * * an action based on or including the same claim." The rule makes no distinction as to how the prior dismissal was effected, so long as the plaintiff was responsible for it.

As to whether a dismissal by stipulation of the parties under Rule 41(a)(1)(ii) should be considered a dismissal by the plaintiff, Rule 41(a)(1), as noted above, specifically provides that stipulation is one of the two ways in which a plaintiff may dismiss an action. Wright and Miller, Federal Practice and Procedure: Civil §§ 2363, 2364 (1971).

I can find no reason to conclude that the rule was not intended to be interpreted as it is written. So far as I can find, no court has ever done so although, in fairness, I should say that apparently no court has ever addressed this precise question.

Two commentators have discussed this or an analogous situation. Professor Moore states that:

"A question remains, however, as to whether a dismissal by notice following a dismissal by stipulation bars another action. It would seem that the exception should not apply in this situation. However, the language of the rule is susceptible to varying constructions, since it states that '* * a notice of

dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed . . . an action . . . (Italics added)." 5 Moore's Federal Practice 141.04 at 1047-48 (2d Ed. 1974).

In a footnote to the latter passage, Professor Moore adds that

"Unlike many stipulations that require court approval to be effective * * * a dismissal by stipulation under Rule 41(a)(1) does not * * * and therefore the stipulated dismissal is by the plaintiff * * * ." Moore's, supra, ¶41.04 at 1048 n.17.

In a Commentary in the Federal Rules Service, the view is expressed that the two-dismissal rule should apply even where the first dismissal was by court order under Rule 41(a)(2), provided it was with the plaintiff's consent:

"Apparently, however, it is immaterial whether the first dismissal was by court order, as under Rule 41a(2), as long as it was taken at the plaintiff's instance."

4 Fed. Rules Serv. 927, 928

Thus, both commentators have apparently recognized that the rule literally applies in the present circumstances.

The only decisions which are to any degree instructive here likewise tend to lead me to the conclusion that it is only the second dismissal whose nature is critical. Wright and Miller, supra at § 2368. Rule 41(a)(1) specifically makes it immaterial whether the first dismissal is in a federal or

a state court. See Rader v. Baltimore & O.R. Co., 108

F.2d 980, 986 (7th Cir.), cert. denied, 309 U.S. 682

(1940). And in Cleveland Trust Co. v. Osher & Reiss, Inc.,

31 F.Supp. 985, 1009 (E.D.N.Y. 1939), the Court stated, in dictum, that the two-dismissal rule would apply even where the first dismissal took place befor the effective date of Rule 41. However, the action was not dismissed because the second dismissal also anteceded the Rule; therefore the matter was not considered by the Court of Appeals in its decision reversing the District Court on other grounds, 109 F.2d 917 (2d Cir. 1940).

Thus, the courts have apparently recognized that an initial voluntary dismissal, under any rule, followed by a notice of dismissal under Rule 41(a)(1)(i), operates as an adjudication on the merits. See Wright and Miller, supra \$ 2368.

The only question remaining on Lybrand's motion is whether the notice of dismissal filed in the Illinois action was filed by a plaintiff who had once voluntarily dismissed. Although the first (Indiana-New York) action was commenced by Dynamark, while the second (Illinois) action and the present action were commenced by Poloron, in both of the latter actions Poloron was only the nominal plaintiff, while Dynamark, by virtue of its seventy-five per cent share in any recovery, is and was the real party in interest in all three

actions. I believe that the two-dismissal rule should not be defeated by a change in the nominal parties, without a change in the real party in interest. Although Robertshaw-Fulton Controls Co. v. Norma Electric Corp., 10 F.R.D. 32 (D.Md. 1950), involved a different situation, in which the change was in the nominal defendants, the following comments of the Court are helpful here:

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"It is argued on behalf of plaintiff
that before Rule 41(a)(1) can be given the
interpretation which we place upon it, the
defendants in both suits must be the same.

With this we do not agree. [A]t the time
the notice of dismissal was filed in this court,
the real defendant in this suit was actually
the same defendant as in the previously dismissed New York suit * * * . It is precisely
the pursuit of such duplicative, wasteful and
harassing litigation that the 'two dismissal'
Rule aims to discourage and prevent." 10 F.R.D.
at 35

For the reasons stated, this Court is impelled to conclude that this ac lon is barred by the two-dismissal rule.

III.

The Counterclaims

The counterclaims interposed by Lybrand are merely permissive counterclaims within the meaning of Rule 13(b), F.R.Civ.P.; they are not compulsory counterclaims under Rule 13(a) since they do not arise out of the same transaction

or occurrence that is the subject matter of plaintiff's claim. Although the success of the first counterclaim for malicious prosecution depends upon the failure of plaintiff's claim, it does not "arise" until the action has been terminated in favor of the defendant. Rosemont Enterprises, Inc. v. Random House, Inc., 261 F.Supp. 661, 695 (S.D.N.Y. 1966); Slaff v. Slaff, 151 F.Supp. 124, 125-26 (S.D.N.Y. 1957; Park Bridge Corp. v. Elias, 3 F.R.D. 94 (S.D.N.Y. 1943); 3 Moore, supra \$13.13 at 13-308.

The second counterclaim is for moneys allegedly owing for professional services and is entirely unrelated to the plaintiff's claim under the securities laws; in no way can it be said to arise out of the same transaction or occurrence as the main claim.

It is well settled that permissive counterclaims require an independent basis of jurisdiction. Warren G.

Kleban Engineering Corp. v. Caldwell, 490 F.2d 800, 802

(5th Cir. 1974); Chance v. County Bd. of School Trustees,

332 F.2d 971, 973 (7th Cir. 1.64); Lesnik v. Public

Industrials Corp., 144 F.2d 968, 976 n.10 (2d Cir. 1944);

Stahl v. Paramount, Inc., 167 F.Supp. 836, 837 (S.D.N.Y.

1958). Since these counterclaims clearly do not raise
federal questions, and since Poloron and Lybrand are both
New York citizens, there is no basis for jurisdiction in
this Court.

IV.

Lybrand's motion for an award of attorney's fees is denied. A successful party may obtain an award of counsel fees only where expressly authorized by statute or by contract, or where his opponent acted vexatiously or in bad faith. Hall v. Cole, 412 U.S. 1, 4(1973); see Demsey & Associates, Inc. v. S.S. Sea Star, 500 F.2d 409, 411 (2d Cir. 1974). Lybrand has not satisfactorily shown that Poloron's behaviour was vexatious or in bad faith.

The complaint and the counterclaims are hereby dismissed.

SO ORDERED.

WILLIAM C. CONNER

United States District Judge

Dated: New York, New York
April 3, 1975

FOOTNOTES

- Coopers & Lybrand was previously known as Lybrand, Ross Bros. & Montgomery.
- George Feiwell represented the Levitts in connection with the acquisition agreement and Dynamark in the first litigation.

Although denominated a third-party defendant, Samuel Levitt has apparently not been served.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

POLORON PRODUCTS, INC.,

Plaintiff,

-against-

LYBRAND, ROSS BROS. & MONTGOMERY (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff,

-against-

FOLORON PRODUCTS OF INDIANA, INC., SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and JEORGE FEIWELL,

Third-Party Defendants.

NOTICE OF APPEAL

72-Civ. 3884

(WCC)

Motice is hereby given that Poloron Products, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Hon. William C. Conner, U.S.D.J., entered in this action on April 3, 1975, which dismissed the complaint herein.

Dated: New York, New York May 2, 1975

GOLD, FARRELL & MARKS

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Attorneys for Plaintivi, Poloron
Products, Inc. and Third-Party
Derendants Carl Levitt, Jay Levitt,
Dynamark Corporation and George
Feiwell

NOTICE OF APPEAL
TO: HUGHES HUBBARD & REED
Attorneys for Defendant and
Third-Party Flaintiff
Lybrand, Ross Bros. &
Montgomery, etc.
One Wall Street
New York, New York 10005

DOTEIN, HAYS, SKLAR & HERZBERG Attorneys for Third-Party Defendant, Poloron Products of Indiana, Inc. 200 Park Avenue New York, New York 10017 AFFIDAVIT OF WILLIAM M. BARRON SWORN TO MAY 28, 1975

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

POLORON PRODUCTS, INC.,

Plaintiff-Appellant, :

- against -

Docket No. 75-7271

LYBRAND, ROSS BROS. & MONTGOMERY : (now known as Coopers & Lybrand),

Defendant and Third-Party Plaintiff- : Appellee,

- against -

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL

POLORON PRODUCTS OF INDIANA, INC.,: SAMUEL LEVITT, CARL LEVITT, JAY LEVITT, DYNAMARK CORPORATION and : GEORGE FEIWELL,

Third-Party Defendants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM M. BARRON, being duly sworn, deposes and says:

1. I am associated with the firm of Hughes Hubbard & Reed, attorneys for defendant and third party plaintiffappellee Coopers & Lybrand ("Lybrand"), am a member of the Bar of this Court and am familiar with the facts and proceedings herein. I make this affidavit in support of Lybrand's motion to dismiss the appeal herein.

- 2. As hereinafter set forth, the appeal herein must be dismissed because the plaintiff below, Poloron Products, Inc. ("Poloron"), and Lybrand have settled their claims against each other and have executed mutual releases.
- 3. The action whose dismissal is the subject of this appeal was commenced by Poloron in 1972. The complaint, as amended, purported to allege a claim under Rule 10b-5 for damages suffered by Poloron in connection with its 1967 purchase of all of the issued and outstanding stock of Levitt Manufacturing Corporation ("LMC"). A copy of Poloron's amended complaint is annexed hereto as Exhibit A.
- 4. Lybrand's answer to Poloron's amended complaint denied the material allegations thereof and asserted two counterclaims, the first alleging the malicious prosecution of successive actions on the same claim, and the second being for the sum of \$4,830 due on account. Lybrand also filed two third-party claims against the prior principals of LMC and others for contribution or indemnity, fraud and malicious prosecution.
- 5. On April 3, 1975 the Hon. William C. Conner dismissed Poloron's amended complaint with prejudice and dismissed Lybrand's counterclaims and third-party claims without prejudice. A copy of the District Court's Memorandum and Order is annexed hereto as Exhibit B.

AFFIDAVIT OF WILLIAM M. BARRON

- 6. Lybrand and Poloron thereupon entered into settlement discussions, reached an agreement and exchanged releases.

 A copy of their settlement agreement is annexed hereto as

 Exhibit C.
- 7. However, Poloron's action against Lybrand had been brought in accordance with a prior agreement with the persons who had sold the LMC stock to it. A copy of this agreement is annexed hereto as Exhibit D. In the agreement, Poloron had promised to file suit against Lybrand and give 75% of any recovery to Dynamark Corporation, the sellers' wholly-owned corporation. (Exhibit D, para. 3). Poloron also agreed to assign its purported claim to Dynamark Corporation on demand if Dynamark paid Poloron for the litigation expenses it had incurred. (Exhibit D, para. 5).
- 8. In the course of the settlement discussions between Lybrand and Poloron, it became apparent that Dynamark Corporation might demand an assignment from Poloron of the claim against Lybrand so that Dynamark could appeal from the order of dismissal and, if successful, prosecute Poloron's amended complaint itself. Lybrand informed Poloron of its belief that an assignment to Dynamark would be champertous and invalid, but stipulated that the release given to Lybrand would not include the purported claim set forth in the amended complaint if that claim was validly assigned to Dynamark Corporation. (Exhibit C, para. 1).

- Upon information and belief, no assignment toDynamark has occurred to date.
- 10. Even if an assignment to Dynamark were executed, it would be champertous and invalid under Section 489 of the New York Judiciary Law. That statute provides in pertinent part as follows:

"[N]o corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of * * * a * * * thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; * * *."

Any assignment to Dynamark would therefore be invalid unless
Dynamark did not demand the assignment "with the intent and
for the purpose" of bringing an action or proceeding on the
assigned claim. Upon information and belief, if there is an
assignment to Dynamark, Dynamark's sole purpose in taking such
assignment is to pursue the present appeal and, if successful,
to prosecute the claim which Poloron has chosen to abandon.
Because such assignment to Dynamark is invalid, Poloron's release
of claims agains. Lybrand (Exhibit C, para. 1) by its terms
extinguished the claim set forth in the amended complaint.
The present appeal is therefore moot and must be dismissed.

WHEREFORE, Lybrand respectfully requests that its motion be in all respects granted.

William M. Barron

Sworn to before me this

78th day of May, 1975

Quil & Truncaro

JOSEPH E. TAMMARO
Notary Public, State of New York

247 A EXHIBIT C TO BARRON AFFIDAVIT SWORN TO MAY 28, 1975 Hughes Hubbard & Recd 1660 L STREET, N. W. ALAN M. MELEAN JOHN S ALLEC AIEL H BAL-GEORGE A : A. 250% E24490 5 C-. 5 CT.S PRATT PEARSALL WASHINGTON, D. C. 20036 212 WHITEHALL 3-6500 PONEL PIERPOINT 202-872-0255 CABLE: HUGHREED NEW YORK JOHN A 2012.44 JOHN & CONCAPA JOHN WESTERDS FASER JOHN & FORTH NE JAMES M. SITTENS THOMAS C.AL* ALLEN S M. DARRILL B ALLEN S M. DARRILL B COMARD & REDINGTON JECHE : POSENDERG RECEPT SCHEFF SIS SOUTH FLONCE STACET TELEX: 12-6557 LOS ANGELES, CALIFORNIA 9307. CA. LE M SCHELL
THOMAS S SCHUELLER
LEGGE G SHAPIRO
ROFERT J S.SA 213-489-5 40 MARINE PLAZA MILWAUNCE, WISCONSIN 51202 414 - 271 - 6627 MARTIN E LCAP P. RUE QUENTIN-DAUSHANT 75000 FARIS ASTTED & CA. FERNA ONLY ACREET A SCHLEI 225-36-01 April 22, 1975 Howard Weinreich, Esq. Botein, Hays Sklar & Herzberg 200 Park Avenue New York, New York 10017 Re: Poloron Products, Inc. v. Lybrand, Ross Bros. & Montgomery v. Poloron Products of Indiana, Inc., et al. 72 Civ. 3884 (S.D.N.Y.) Dear Mr. Weinreich: This letter will confirm the agreement which has been reached between your clients Poloron Products, Inc. ("Poloron") and Poloron Products of Indiana, Inc. ("Poloron Indiana") and our client Coopers & Lybrand ("Lybrand"), formerly known as Lybrand, Ross Bros. & Montgomery, with respect to the above captioned litigation. As you know, the Court on April 3, 1974 ordered the dismissal with prejudice of the claims against Lybrand set forth in Poloron's March 11, 1974 amended complaint (the "Amended Complaint") and ordered the dismissal without prejudice of Lybrand's counterclaims and third-party claims. You have informed us that Poloron may assign to Dynamark Corporation all right which Poloron may have to appeal from the April 3, 1975 order of dismissal, together with any and all right to further pursue its claim for damages as set forth in the Amended Complaint. The terms of our agreement are as follows: Poloron and Poloron Indiana hereby release Lybrand from any and all claims for

EXHIBIT C TO BARRON AFFIDAVIT Howard Weinreich, Esq.

2

actual or exemplary damages which they may have against Lybrand, except that this release shall not affect or impair the validity of the abovementioned assignment by Poloron or the abovedescribed claim being assigned to the extent it is validly assigned to Dynamark Corporation. Poloron has been advised that Lybrand, for reasons unrelated to this release, considers such assignment to be invalid, and nothing contained herein shall operate to waive or in any way affect or impair any objection which Lybrand has to such assignment.

- Poleron and Poloron Indiana hereby agree 2. to pay over promptly to Lybrand, by cash or certified check, any and all monies which either of them may receive by virtue of any judgment which may be entered against Lybrand in favor of Poloron, Poloron Indiana, Dynamark Corporation, Samuel Levitt, Carl Levitt, Jay Levitt, George Feiwell, or any of them, in any legal proceeding now pending or hereafter commenced; provided, however, that in lieu of making such payment to Lybrand, or in addition thereto, Poloron and, or Poloron Indiana shall upon demand from Ly'rand assign to Lybrand any and all right which they may have to share in or receive the proceeds of any such judgment.
- 3. Poloron hereby further agrees to deliver to Lybrand, by cash or certified check, the sum of \$9,830 on or before May 2, 1975.
- 4. Lybrand hereby releases Poloron and Poloron Indiana from any and all claims for actual or exemplary damages which it may have against them, it being understood, however, that said release by Lybrand shall in no way affect or impair Lybrand's rights with respect to the assertion by it of any cause or causes of action which it may have against Dynamark Corporation, Samuel Levitt, Carl Levitt, Jay Levitt, George Feiwell or against any person or entity whatsoever other than Poloron and Poloron Indiana, all of which rights Lybrand expressly reserves.

EXHIBIT C TO BARRON AFFIDAVIT

Howard Weinreich, Esq.

5. This agreement shall be interpreted in accordance with the laws of the State of New York.

If Poloron and Poloron Indiana agree that the foregoing completely and accurately sets forth the terms of their agreement with Coopers & Lybrand, please so indicate by executing the enclosed copy of this letter in the space indicated and returning it to us.

Very truly yours,

HUGHES HUBBARD & REED

for Coopers & Lybrand

3

AGREED TO AND ACCEPTED THIS DAY OF APRIL, 1975

BOTEIN, HAYS SKLAR & HERZBERG

Attorneys for Poloron Products, Inc.

and Poloron Products of Indiana, Inc.

250 A. EXHIBIT 3 TO AFFIDAVIT OF MARTIN R. GOLD SWORN TO JUNE 4, 1975 May 2, 1975 Howard L. Weinreich, Esq. Botein, Hays, Sklar & Herzberg 200 Park Avenue New York, New York 10017 Re: Poloron Products, Inc. v. Lybrand, Ross Bros. & Montgomery, et al. Dear Howard: This is to confirm the agreement we have reached on behalf of our clients, which is as follows: 1. We are authorized to, and shall immediately file a notice of appeal on behalf of Poloron Products, Inc. 2. As soon as practicable, Poloron will assign all of its claims against Lybrand to Dynamark Corporation in accordance with the agreement of June 25, 1971 between Dynamark and Poloron, and our recent correspondence on the The dispute which has arisen concerning the expenses required to be paid pursuant to that agreement at the time of such assignment is compromised and settled between our clients, the agreement being that Dynamark shall pay the sum of \$4,500 to Poloron at the time of the assignment, in settlement of all such claims. 4. As soon after the consummation of such assignment as may be practicable, Dynamark shall move the Court for an order substituting itself as plaintiff in the above action Sincerely, Martin R. Gold MRG: adk bcc: George Feiwell, Esq. Mr. Jay Levitt

EXHIBIT 5 TO AFFIDAVIT OF MARTIN R. GOLD SWORN TO JUNE 4, 1975

FOR GOOD AND VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, Poloron Products, Inc. does hereby assign and convey to Dynamark Corporation all of its rights in and to the claims set forth in its Amended Complaint against Lybrand Ross Bros. & Montgomery, et al, 72 Civ. 3884 (S.D.N.Y.) including the right to appeal from the April 3, 1975 order of dismissal filed in that proceeding.

This assignment is given pursuant to Paragraph 5 of a Letter Agreement dated June 25, 1971 by and between Dynamark Corporation and Poloron Products, Inc.

IN WITNESS WHEREOF, the undersigned corporation has executed this assignment the 13 day of May, 1975.

POLORON PRODUCTS, INC

By

President

HLW: sm

bc: Mr. David Hanania

Howard L. Weinreich

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

COUGLAS NORDLINGER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 601 Woodmere Boulevard, Woodmere, New York 11598. That on July 10, 1975, deponent served the within Appendix upon:

Hughes, Hubbard & Reed Attorneys for Defendant and Third-Party Plaintiff-Appellee One Wall Street New York, New York 10005

Botein, Hays, Sklar & Herzberg Attorneys for Third-Party Defendant Poloron Products of Indiana, Inc. 200 Park Avenue New York, New York 10017

by depositing true copies of same enclosed in post-paid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 10th day of July, 1975.

Notary Public, and Includent Co. 4517227 - Qual. in Guerns Co. 1976

Plotony Public, State of New York 4517227 - Qual. In Queens Co. Commission Expires March 30, 1976

Received 3 copies	he within
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